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

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM 2022-004-000219
[2023] NZFC 10351

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[HANNAH EVANS] Applicant
AND	[JEREMY EVANS] Respondent

Hearing:	15 May 2023
Appearances:	V Crawshaw KC & G Edwards for the Applicant No appearance for the Respondent M Headifen as Lawyer for the Children
Judgment:	26 May 2023

RESERVED DECISION OF JUDGE I A McHARDY
[As to parenting orders]

Introduction

[1] The applications before the Court seek determination of the day-to-day care arrangements for the parties' two children, namely [Thomas Evans] born [date deleted] 2016 and [Olivia Evans] born [date deleted] 2018. The parties had separated on 4 October 2021. They had been married some 6 ½ years.

[2] Following separation up until 17 March 2022 the parties parented these children without the need for Court intervention, although there was correspondence going on between the lawyers as to an agreed parenting arrangement.

[3] These proceedings arose from what has been described as an "incident." The respondent father (Mr [Evans]) formed the view that the applicant mother (Ms [Evans]) had had a relapse of her addiction to alcohol and that this was placing their children in an unsafe situation. Ms [Evans] has at all times denied a relapse – she says that at that time she was suffering a migraine headache and does not accept that the children were in an unsafe situation.

[4] Mr [Evans] and his brother, [Silas Evans], went to Ms [Evans]'s home and eventually attempted to uplift both the children, who at the time were in Ms [Evans]'s care, succeeding only in taking [Olivia]. They claim that their actions were to protect the children and that Ms [Evans] had agreed to Mr [Evans] taking the children at this time.

[5] What has followed from these events has been a very acrimonious dispute which cries out for resolution. There have been delays in progressing matters in a timely fashion – one reason being the number of interlocutory applications that have been filed and the subsequent appeals that have followed from decisions of this Court. Venning J described the file as a "procedural morass" when he dismissed an appeal that Mr [Evans] had filed in the High Court.

[6] On 13 September 2022, a 5 day hearing was allocated to determine the care arrangements for these children. A back up fixture was allocated for 15-19 May 2023 with a primary fixture being set for 18-22 September 2023. At that time a direction was made that no further steps in the proceedings may be taken without leave and that no application for an adjournment would be considered by the presiding Judge or long cause management Judge until all other parties had been notified and given reasonable time to respond.

[7] Subsequent to that, the parties were advised that the matter would be called on as a primary fixture on 15 May 2023. The fixture for 18-22 September 2023 was

vacated as being no longer required. That advice was given to the parties on 11 November 2022.

[8] Following the matter being set down for hearing the Court has been required to deal with numerous issues that the parties, mainly Mr [Evans], continued to raise. It would seem that even when the particular issues were dealt with, further issues/applications were filed by Mr [Evans] including an application for stay in March 2023. That application was dismissed by Judge Muir on 29 March 2023.

[9] On 16 December 2022 Judge Muir dealt with a number of issues that had been raised. He issued five Minutes in which he made rulings/orders in respect of some of these issues. He reserved his decision on two other issues and provided his reserved decision on those on 17 February 2023.

[10] In that decision he recorded that the proceedings and disputes between the parties had ballooned from the 17 March incident to the point where the Court have had affidavits and applications that now ran to many hundreds of pages. He noted that the proceedings had been set down for a 5 day hearing as a firm fixture in May 2023 which was the opportunity for the Court to consider all of the relevant evidence for the parties and any relevant witnesses to be cross-examined and for the Court to make decisions about what is in the welfare and best interests of [Olivia] and [Thomas].

[11] In that decision he had this to say in respect of s 4(2)(b) of the Care of Children Act 2004 (COCA):

> [13] Behind the intense conflict in the invective that is erupting between the adults, sit [Thomas] and [Olivia]. They have important rights that are not being met. They have a right to have decisions affecting them made and implemented within a timeframe that is appropriate to their sense of time.

[12] Judge Muir granted an application by Ms [Evans] to appoint counsel to assist pursuant to s 95 of the Evidence Act 2006. Mr Locke, barrister, was appointed for that purpose – to cross-examine Ms [Evans] for Mr [Evans]. On the eve of the hearing the Court received a memorandum signed by counsel for the applicant, lawyer for child, Mr Locke and Mr Collis (who had had a specific appointment as counsel to assist in relation to an issue on the file).

[13] That memorandum sought directions from the Court which would enable Mr Locke to act for Mr [Evans]. His appointment as counsel to assist was therefore terminated. However, out of an abundance of caution the Court was asked to agree to Mr Collis staying on as counsel to assist in the event that Mr Locke, for whatever reason, was unable to act as counsel for Mr [Evans] when the hearing started on Monday 15 May. This was a most unusual step but highlighted the distrust which existed and had been generated by the various interventions that had occurred already.

[14] On the morning of the first day of the hearing Mr Locke filed a memorandum in which he advised that despite considerable preparatory work being carried out by him in expectation of his engagement as counsel for Mr [Evans], he had not been engaged, a letter of engagement not having been signed, arrangements not made in respect of his costs and adequate instructions to enable hearing preparation had not been received. In the memorandum he indicated that he had informed Mr [Evans] the previous evening that he should not anticipate this would provide grounds for an adjournment and that he should be ready to proceed, including having a list of cross-examination questions for Mr Collis to put to Ms [Evans] at the hearing.

[15] Mr [Evans] did not appear when the matter was called at 10 am Monday 15 May. Enquiries were made as to his whereabouts including the Court ringing his cell phone which went unanswered. Mr Collis had had no instructions. At 10.20 am I directed the matter proceed. After the hearing started, an email was received from Mr [Evans]'s brother [Silas Evans] indicating that there had been a medical certificate obtained which stated that Mr [Evans] was not well enough to attend Court for a week. No certificate was provided and the hearing proceeded. An email was sent to [Silas Evans] advising that the matter was proceeding. It was noted that no medical certificate had been provided to the Court.

[16] Later in the day [Silas Evans] provided by email a medical certificate from the [a local Medical Centre], by Dr [Jung]. It was addressed to the Registrar of the Family Court and certified:

> Mr [Evans] was seen by me on 15 May 2023 in extreme mental distress. He is currently in no position to attend court today at 10.30am. I have started him on medications to help stabilise his condition. He will need ongoing

> monitoring from his regular GP. He has an appointment to see [his own GP] at 10.30am tomorrow.
>
> Signed Dr [Jung]. Dated 15 May 2023.

[17] I ruled that the hearing was to continue and the evidence was finalised. Mr [Evans] had been advised that he could still able to attend Court. It was apparent from the affidavit evidence that it was vital for these children's welfare and best interests that there needed to be a resolution of this dispute. I reserved my decision.

[18] The Court has had the benefit of reading numerous affidavits which had been filed in respect of the substantive applications. I had viewed video evidence filed by both parties. Ms [Evans] has been cross-examined by Lawyer for child who also cross-examined Ms [Evans]'s mother and Dr Sarah Calvert, who had given an affidavit in respect of Ms [Evans]. Given Mr [Evans]'s non-attendance and the non-attendance of his witnesses no cross-examination of them was possible.

[19] The overwhelming priority was what was best for these children. They were entitled to have their position considered bearing in mind that they had been placed in a shared care arrangement in March 2022 in what was seen as a temporary arrangement pending the hearing of the applications. The reality of the situation the Court was faced with was that if the hearing did not proceed it could be a further 12 months before another hearing date could be allocated. On balance, the interests of the children prevailed over the father's issues which were presenting.

[20] There had been no suggestion that there was a lack of capacity on the part of Mr [Evans]. Mr Locke who had obviously been in contact with Mr [Evans] on a previous day did not raise any issue as to Mr [Evans]'s capacity. Mr [Evans]'s absence posed problems but having read his affidavit evidence I was left in no doubt as to his position. Cross-examination of him was not essential.

Applicant's position

[21] Counsel for Ms [Evans] had filed opening submissions which set out Ms [Evans]'s position. I propose to refer to these initially under the headings listed in the submissions as I consider they address the relevant issues.

Legal principles

[22] The law requires that the welfare and best interests of [Thomas] and [Olivia] and their particular circumstances must be the first and paramount consideration in this proceeding.

[23] Section 5 of the COCA sets out the 6 principles that must be taken into account when the Court considers what best serves a child's welfare and best interests. While all principles included in s 5 of the COCA are important considerations, of particular relevance to the issues before the Court are ss 5(a) and 5(e).

The children

[24] [Thomas] is 7 years old and was diagnosed with autism spectrum disorder in April 2020, when he was 4 years old. His diagnosis includes emotional dysregulation, oppositional defiance, lack of flexibility and social communication difficulties. The parties' daughter [Olivia] is 4.5 years old.

[25] The Court is reminded that the report under s 133(1B) of the COCA, ordered by the Court on 31 August 2022 has not yet been prepared. The report was to set out [Thomas]'s medical history, address the treatment of any special needs, the extent of these needs and comment (if possible) on how best to manage them.

The children's views

[26] Pursuant to s 6 of the COCA, any views of the children must be taken into account by the Court. Mr Headifen has provided two reports to the Court which address the children's views. The first was in April 2022 when he met with [Thomas] and [Thomas]'s views from that meeting were provided to the Court. A further reported, dated 12 May 2023 updates the Court in respect of those views. These will be discussed later.

Section 5(a) of the COCA

[27] The principle in s 5(a) of the COCA is that a child's safety must be protected from all forms of violence from all persons. Section 5(a) should be given particular emphasis when establishing what is in the welfare and best interests of the children.[1]

[28] It is submitted that the context of s 5(a) is far wider than safety from physical violence. A child must also be protected from any threats to their physical, physiological or psychological well-being and development. In *Fontaine v Millard*, Judge Moss addressed s 5(a) of the COCA at [12]:

> Safety is the first consideration. The expression in the legislation is mandatory. A safety assessment requires more than consideration of immediate physical safety. It requires consideration of broad matters of child development, and at times balancing the consequences in one set of circumstances with the consequences in another. This will require a balancing of risk.

[29] The submission is made that the question for the Court in this case is whether there is an unacceptable level of risk to the children in relation to the allegations the parties have made against each other, which will impact on the children's care arrangements. Counsel for the applicant has referred the court to concerns held by the applicant.

Mr [Evans]'s use of physical violence against [Thomas] and [Olivia]

[30] Ms [Evans]'s allegation under s 5(a) against Mr [Evans] primarily relate to his treatment of [Thomas]. Ms [Evans] has alleged that Mr [Evans] is prone to anger quickly, he has used physical violence to discipline [Thomas], has difficulty managing [Thomas]'s diagnosis of autism spectrum disorder and does not provide a sufficient degree of support for [Thomas]'s overall well-being.

[31] In particular, Ms [Evans] alleges that Mr [Evans] has been physically violent by:

(a) Kicking [Thomas];

---

[1] *Fontaine v Millard* [2016] NZFC 3545 at [12].

(b) Dragging [Thomas] through his own urine after [Thomas] urinated on the ground;

(c) Shoving [Thomas] off the trampoline;

(d) Standing over [Thomas] with his full body weight; and

(e) Leaving [Thomas] (at four years old) unattended near the road and a swimming pool.

[32] It is submitted the allegations are serious in nature given they concern physical violence by Mr [Evans] against [Thomas] which occurred for two years prior to the parties separating.

[33] [Thomas] has also alleged that his father has used physical violence against him. At Mr Headifen's initial meeting with [Thomas] in April 2022, [Thomas]'s account was:

> …He did not think there was anything good about living with his dad. When I asked him about his dad he told me that he hit him. I asked him to "tell me more about that" and [Thomas] said "No" (he would not). In the same vein I asked him what the good things about his mum were. He told me that she did not hit us.

[34] In addition, Ms [Evans] alleges inappropriate behaviours in [Olivia]'s bedroom following their separation. She alleges that she heard him masturbating while in the room with the parties' sleeping three year old on two separate occasions.

[35] It is acknowledged Mr [Evans] denies these allegations and does not accept that there are any concerns in relation to his parenting. Accordingly, his evidence does not address any attempts by him to tailor his parenting to [Thomas]'s specific needs arising from his autism spectrum disorder or any steps taken to prevent further violence occurring.

Further safety risks caused by Mr [Evans]'s conduct since 17 March 2022

[36] The submission is made that when a Court is considering the welfare and best interests of a child in his or her particular circumstances they may take into account a parent's conduct, to the extent that the parent's conduct is relevant to the child's welfare and best interests.

[37] It is argued that beyond the allegation of physical violence, Mr [Evans]'s conduct since 17 March 2022 has caused emotional harm to the children by negatively affecting the children's relationship with Ms [Evans] and causing significant dislocation of their settled care arrangements. It is noted that Mr [Evans]'s conduct includes, but is not limited to, the following actions:

(a) Retaining the children without justification for 22 days from 21 March 2022 until 8 April 2022 and refusing to permit contact with Ms [Evans] except to the most minimal extent.

(b) Retaining the children in breach of the interim parenting order on 21 November 2022 resulting in a warrant to enforce being issued on 23 November 2022 and an order preventing the children's removal from New Zealand.

(c) Threatening to retain the children in breach of the interim parenting orders on 17 December 2022 despite providing an undertaking on 16 December 2022 that he would not retain the children in his care without further orders from the Court. This resulted in the Court issuing another warrant to enforce the interim parenting order.

(d) Refusing to consent to [Thomas] attending a paediatrician's appointment which resulted in a hearing being required and the Court making directions under s 46R of the COCA.

(e) Embarking on a campaign of psychological abuse against Ms [Evans], which has impacted the children, particularly given that he has referred

to Ms [Evans] in a derogatory way in multiple emails copied to the children's doctors and the children's school principal.

[38] The hostility exhibited by Mr [Evans] towards Ms [Evans] is said to be a significant risk factor for the children and this has lead to a destabilisation of the children's care arrangements. The instability of the situation is likely to cause particular harm to [Thomas] because of his autism spectrum disorder.

[39] The Court has recognised that Mr [Evans]'s actions are a matter of genuine concern and antithetical to the children's welfare. On 20 December 2022, Mr [Evans] was warned by the Court that if there were further serious breaches by him that the Court may have no option but to limit his care/contact.

[40] The submission is made that given Mr [Evans]'s flagrant disregard of Court orders to date, there is a significant risk of him destabilising the children's care arrangements and causing further emotional harm to the children.

Safety allegations against Ms [Evans]

[41] Since 17 March 2022, Mr [Evans] has alleged that Ms [Evans] has relapsed and that the children are not safe in her care. He has now ramped up his allegations against Ms [Evans] to such an extreme level that there are too many to list individually. However, Mr [Evans]'s allegations broadly relate to:

(a) Ms [Evans]'s struggle with alcoholism impacting her parenting;

(b) Ms [Evans]'s anxiety and depression, and the medication she is prescribed, impacting her parenting;

(c) Ms [Evans] discussing adult issues with the children; and

(d) Ms [Evans] alienating the children from Mr [Evans]'s family.

Ms [Evans]'s alcohol recovery does not impact on her ability to parent

[42] Ms [Evans] accepts that she is an alcoholic, that she has relapsed in the past and that these relapses were serious in nature. However, she continues to address her alcoholism. She has attended Alcohol Anonymous (AA) since 2005 and remains committed to her sobriety through the AA 12 Steps Programme. She attends AA meetings regularly, remains involved in service groups with AA and attends regular counselling sessions with her psychologist, Christine Cowan-James. She has not consumed any alcohol since December 2019.

[43] Ms [Evans] denies Mr [Evans]'s allegations that she drank alcohol and relapsed on 17 March 2022. Her view is that Mr [Evans]'s allegations are retaliatory in nature and that there was no basis for his alleged concerns on 17 March 2022. As recognised by Judge Burns at the Pickwick Hearing, whilst allegations were made of a relapse, there was no actual proof that had happened. Rather, Mr [Evans] has seized upon Ms [Evans]'s alcohol recovery in an attempt to dictate and control the children's care arrangements.

[44] Notwithstanding this, Ms [Evans] has taken every step to ensure that sufficient evidence is before the Court to demonstrate the children are not at risk in her care. She has provided a psychologist report, urine and blood tests establishing alcohol and/or medication use, along with three reports from her doctor setting out the medications she is prescribed, their dosage and the impact on her when taken in conjunction with each other and with alcohol.

[45] In addition, since 7 April 2022, she has administered the Smart Start IN – HOM device once daily between 5 pm to 7 pm. By the date of the hearing, she will have administered the device for 401 days. She has returned a nil result for alcohol for every test result. Technical issues have occurred with the device on two occasions (November 2022 and April 2023) which have been explained in correspondence and evidence.

[46] The evidence Ms [Evans] has filed demonstrates that in the past she has sought treatment when she has relapsed and has a solid support network of people in her life to ensure treatment is sought quickly and complied with.

[47] Similarly, Ms [Evans] has accepted that she has struggled with anxiety and depression in the past. However, she denies Mr [Evans]'s allegations that she has misused the medication that has been prescribed to her. Ms [Evans]'s doctor made clear in a report dated 9 May 2022 that:

> Although there are multiple medication [*sic*] been used here they have all been careful dose adjusted to achieve good control of symptoms without unnecessary and incapacitating adverse effects. The treatment is currently affective and stable. There is no impact of this medication on the ability to function independently as a parent.

The children are not at risk in Ms [Evans]'s care

[48] The submission is made that despite Mr [Evans]'s assertions to the contrary, having a mental illness (including alcoholism) does not preclude Ms [Evans] from being a safe, reliable and attentive parent.

[49] In *Bristow v Fisher*, Judge Black noted:[2]

> … The question is in each of your current situations is there an unacceptable risk of relapse that would put the children's welfare at risk, and I do not think there is, and the reason I say that is because of two things. The first thing is the factors that are protective against relapse and the second are the factors that are protective of the children's welfare and interests if there were to be a relapse.

[50] It is argued that the protective measures that Ms [Evans] has put in place (both against relapse and to protect the children's welfare and best interests) demonstrate that there is not an unacceptable risk of relapse that would threaten the children's welfare.

[51] Finally, in this regard it is submitted that Ms [Evans] does not accept that she has discussed "adult issues" with the children or that she has alienated the children

[2] *Bristow v Fisher* [2020] NZFC 4915 at [41].

from Mr [Evans]'s family members. Ms [Evans] has addressed this extensively in the evidence she has filed.

Is it in the children's welfare and best interests for the children to be in Ms [Evans]'s day to day care?

[52] Ms [Evans], it is submitted, accepts that the children have been cared for by their parents in the past 13 months, however the shared care arrangement was only imposed by the Court because of the urgency of the situation at that time, along with the allegations made by each party.

[53] What has since transpired presents an entirely different situation for the Court's consideration and what is actually in the children's welfare and best interests.

[54] Ms [Evans] seeks that the children be in her day to day care as the circumstances of this case simply do not contain the ingredients required for a shared care arrangement. The minimum conditions for a workable sharing of day to day care have been identified as:[3]

(a) each parent must be individually suitable as a day to day carer;

(b) both parents are committed to sharing care, primarily in the interests of the children; and

(c) the parents must be able to co-operate with each other. This requires either an amicable relationship between them, or a mature ability to isolate their parenting responsibilities from their personal relationship.

[55] The submission is made that whilst it might be tempting to characterise this case as one of inter-parental conflict, that would be simplistic and risk inaccuracy. Rather, it is a situation where Mr [Evans] has subjected Ms [Evans] to an onslaught of

[3] Bill Aitkin, Ruth Ballantyne, Shonah Burnhill, John Caldwell, Judge Dale Clarkson, Professor Mark Heneghan and Kirsty Swadling (eds) *Family Law in New Zealand* (18th ed, Lexus Nexis, Wellington, 2017) at 6.103E.

emotional and psychological abuse (including litigation abuse) throughout these proceedings.

[56] It is said that Ms [Evans] has attempted to manage this barrage from Mr [Evans] as best she can to shield the children from the conflict. However, it is submitted it is evident from the proceedings Mr [Evans] has filed that he has been entirely unable to engage with Ms [Evans] constructively or in a manner which protects the children's welfare and best interests. This is a continuation of similar behaviour exhibited during the parties' relationship, when Mr [Evans] was abusive to Ms [Evans] including in relation to her alcohol recovery.

[57] It is argued that Mr [Evans]'s conduct has shown no sign of abating. Tellingly, although he was directed to do so, Mr [Evans] has failed to provide a psychologist's report from an independent expert as to his own mental health issues.

[58] In *AJD v KGD*, Judge McAloon refused to order equal shared care because of the father's 'mean-spirited' view of the mother that would affect the children's development if they were exposed to him for too long. His Honour identified that:[4]

> That mean-spirited assessment powerfully illustrates Mr D's entrenched opinion about and the view of Ms S … He is unable to attribute to her any motive that is not self-serving. Those views, added to his consistent portrayal of himself as a victim, his emotional liability, and his self-absorption, all present risks to the children's healthy psychological emotional growth and development should they be exposed to him for consistently long periods.

[59] The submission is made that [Olivia] and [Thomas] have a right for their care, development and upbringing to be primarily the responsibility of their parents and for this to be facilitated by ongoing consultation and co-operation between their parents.[5]

[60] The requirement for co-operation between the parents is well known to reflect the need for children not to be exposed to conflict as such exposure threatens their safe development.[6] Accordingly, being in the day to day care of Ms [Evans] is said to be necessary and in the children's welfare and best interests.

---

[4] *AJD v KGD* FC Hamilton FAM 2004-019-1896, 6 October 2005 at [19].
[5] Care of Children Act 2004, s 5(b) and 5(c).
[6] *Fontaine v Millard,* above n 1, at [16].

Additional terms and conditions to parenting order

[61] The Court has the power to attach terms and conditions to a parenting order under s 48(4) of the COCA. Ms [Evans] seeks that a condition be attached to the final order the parents are not to have contact with each other unless it relates to urgent matters regarding the children where their wellbeing and safety is in question. This protective direction is required from the Court, so as far as it is possible, the level of conflict is reduced and the children's safety is enhanced.

[62] Further, Ms [Evans] seeks a continuation of the condition imposed in the interim order that Mr [Evans]'s brother [Silas Evans] is not to have contact with the children. It is argued this protective measure was put in place at the Pickwick hearing because the Court recognised that [Silas Evans] was heavily involved in the 17 March incident, the decision-making relating to it, and had no status to be involved in the way he was.

[63] Despite this, [Silas Evans] has been relentless in his attempts to insert himself into these private proceedings. Mr [Evans] has repeatedly sought that [Silas Evans] be his MacKenzie Friend despite the Court declining this on every occasion.

[64] It is said that [Silas Evans] has also displayed a concerning pattern of conduct towards Ms [Evans] over the past 13 months. He has repeatedly emailed her in a threatening way (despite being advised his actions amounted to harassment), contacted Ms [Evans]'s doctor's office to obtain her private medical records and added inflammatory comments to the affidavit Mr [Evans] has filed. Somewhat incongruously, given that he is not a party to these proceedings, he has also emailed Ms [Evans]'s lawyers and the lawyer for child directly to express (in immoderate terms), his dissatisfaction with these proceedings.

[65] It is argued that [Silas Evans]'s constant undermining of Ms [Evans] as a parent has the potential to impact negatively on the children's relationship with their mother. Allowing [Silas Evans] to have contact with the children also threatens the stability of the children's care arrangements.

[66] While it is acknowledged that a child's relationship with their extended family should be preserved and strengthened in accordance with s 5(e) of the COCA, in this case, this principle is outweighed by the risk [Silas Evans]'s contact with the children poses to undermining the principles of ss 5(b) and 5(c) of the COCA along with the first part of s 5(e), that the children should continue to have a relationship with both parents.

[67] Ms [Evans] has filed draft orders setting out the final terms of the parenting order that she seeks.

[68] At the hearing, counsel for Ms [Evans] made an oral application that she be entitled to arrange for [Thomas] to be seen by a paediatrician without requiring the consent of Mr [Evans]. The application was made on the premises that Mr [Evans] had effectively managed to stymie all previous attempts for Ms [Evans] to seek assistance for [Thomas] who has now not been seen by a paediatrician since 23 August 2021.

[69] On 31 August 2022 Judge Muir appointed Dr Warwick Smith to be [Thomas]'s paediatrician. Following that direction from the Court, Dr Smith declined the referral of the appointment. By minute dated 16 December Judge Muir amended the s 46R direction so that Dr Jamie Speeden would be [Thomas]'s paediatrician. A referral was made by [Thomas's GP], to Dr Jamie Speeden on 3 November 2022. Dr Speeden's office has confirmed that the referral was received after the cut off period for last year and referrals will not be accepted until 4 December 2023. [Thomas] will not be able to be seen by Dr Speeden until January 2024. Ms [Evans]'s correspondence with Dr Speeden's office has been provided to the Court attached to counsel's memorandum.

[70] Section 46R of the COCA provides that where two or more guardians cannot agree on a matter concerning the exercise of their guardianship, either guardian may apply to the Court for its directions. A Court has the power to make any other order relating to the matter in dispute that the Court thinks proper.

[71] The submission is made that it is in [Thomas]'s welfare and best interests that he be seen by a paediatrician without any further delay. Ms [Evans] seeks a

guardianship order providing a special condition relating to [Thomas]'s medical needs in terms of the draft orders accompanying the memorandum. The order as drafted may be viewed as an order in fact implementing in detailed terms the order made by His Honour Judge Muir on 31 August 2022.

Mr [Evans]'s position

[72] No opening submissions were filed by Mr [Evans] despite directions being made for such. It is however very clear from the affidavit evidence what his position is. He believes that Ms [Evans] has relapsed and therefore she is not able to be entrusted with the parenting of their children. He seeks the primary care of the children and believes that Ms [Evans]'s contact with the children should be supervised.

[73] Initially Mr [Evans] in his affidavit of 30 March 2022 identified only three areas of concern about Ms [Evans] being:

(a) alcoholic relapse;

(b) prescription drug misuse; and

(c) mental health vulnerability (anxiety and depression).

[74] This he expanded in April 2022. He indicated that there were seven areas of concern for him. They were:

(a) alcoholic relapses;

(b) prescription drug misuse;

(c) mental health vulnerability;

(d) the impact of stress of parenting on Ms [Evans];

(e) discussion of adult issues in front of the children;

(f) lack of overnight support for risks associated with the regular use of medication;

(g) deception about events.

The incident

[75] Given the consequences of the events that unfolded on 17 March 2022 it is necessary for the Court to consider carefully the evidence that is before the Court in respect of it. The findings of the Court will be crucial when considering what ultimately is the best possible care arrangements for these children.

[76] The Court has before it each party's account of what happened on 17 March 2022. Also, there were two very relevant videos, one which show a Facetime call initiated by the parties' son [Thomas] to his father in which [Thomas] advised Mr [Evans] his mother was ill. The second video is a video taken by Ms [Evans] on her mobile phone showing what happened when Mr [Evans] and his brother came to her home following that Facetime discussion.

[77] During the Facetime discussion, Mr [Evans] asked Ms [Evans] what were the symptoms of her illness. Ms [Evans] told him that she had a migraine, blocked nose and was feeling nauseous. He enquired as to who was going to help her if she was not well and was advised that [Linda] and [Danny] were going to bring her everything she needed. She advised she had got Nurofen and Panadol. During the discussion Mr [Evans] asked whether Ms [Evans] needed him to take the children off her hands earlier than the next day. Ms [Evans] indicated that the nanny was still at the home and was going to help her get the children ready for bed. She indicated that "*it's probably worth us, not tonight. Just because I'm not up to it, um*." She went on to say "*it's probably worth us having a conversation um just about what we do because if I have it um, they probably do too*." ("Have it" referring to the possibility of Covid).

[78] After some further discussion which involved [Thomas], the transcript reads as follows:

[Jeremy]: [Hannah], I'm just a bit concerned because you sound like you're drunk.

[Hannah]: Pardon?

[Jeremy]: You sound like you're drunk.

[Hannah]: Ah, I'm not.

[Jeremy]: I'm quite concerned. How …what are you going to do?

[Hannah]: About what?

[Jeremy]: Well [the nanny] will need to stay, or I will need to come and get the kids.

18 seconds of silence

[Hannah]: I've been sick since last night [Jeremy].

[Jeremy]: So why didn't you bring the kids over to me or get [the nanny] to?

[Hannah]: Um, because it's their night with me.

[Jeremy]: Yeah but if you're not well we could swap a night or do something different.

[Hannah]: Yeah I can ask them. I can assure you that I' m not drunk. That's …so don't go into it.

[Jeremy]: Your voice really does sound like you've been drinking I'm sorry. Have you taken any medication?

[Hannah]: No. I've had Panadol and Nurofen.

[Jeremy]: OK, can you get [Thomas] to get [the nanny] there or talk to [the nanny]?

[Hannah]: Yeah. What are you asking [Jeremy]?

[Jeremy]: Where's [the nanny]?

[Hannah]: In [Olivia]'s room.

[Jeremy]: Hey um [Olivia] hey [Olivia] oh look at the cat.

End of video.

[79] There is a subsequent video where Mr [Evans] discusses matters with the nanny in Ms [Evans]'s presence. Ms [Evans] asked the question "*What would you like me to say [Jeremy]? I'm not feeling great*." Mr [Evans] replies, "W*ell I'm just thinking that maybe [the nanny] could bring them to back to me the night and maybe could just*

look after them so that you don't have to worry and you can get well and then you can call any support you need."

[80] The video ends after a discussion about possible Covid. Mr [Evans] says "*So do you want [the nanny] to bring them over to me tonight and I'll look after them and return them to you*." [Thomas] then says "*No*" followed by Ms [Evans] saying, "A*h yeah but you're going to have to isolate ok*." The tape finishes with Mr [Evans] saying "*Yeah, yeah*" and [Thomas] saying "*No. No*."

[81] In answer to questions at the hearing Ms [Evans] indicated that she may have then said that Mr [Evans] could come over and check for himself. That was after the videoing had stopped.

[82] There has been a subsequent video provided in evidence which shows that Mr [Evans] and his brother did arrive at Ms [Evans]'s home. Ms [Evans] had been talking to her lawyer and proceeded to video what then took place. This video is revealing. A transcript of the video has been made and was provided in Ms [Evans]'s affidavit of 29 March 2022. The matter that stood out initially was the role played by [Silas Evans]. Early in the video he says to Ms [Evans],

> So [Hannah], I'm [Silas] [Jeremy]'s brother, and I have observed your parenting drunk and impaired today. I have a lot of experience of alcoholics through my friends. You have also threatened and been rude to you, and you have also escalated this.

Ms [Evans] then says:

> How have I threatened you [Silas]?

His reply was:

> At the front door. You have been quite rude to me and there is no need. I am here to support my brother. I'm doing everything I can to help you. And now you have escalated to your parents and I'm a little annoyed with you. Because you are doing this in front of the children and we would like to take the children away where they are safe.

[83] At that point Ms [Evans] has called her neighbours [the first neighbour] and [the second neighbour] to come over. [Silas Evans] continues to press, "*Do you consent*" and "*Do you consent to us taking the children*?" He then says:

> [Hannah], I just asked you straight, have you had any drinks or alcohol today. Yes or no because I've observed you myself and I have to ask that question. Oaky we are going to have to stop because the children are here now.

[84] At this stage the neighbours were present and the conversation continued. [The second neighbour] offers to have the children while "*you sort it out*." [Silas] then announces:

> We are going to have to escalate it now.
>
> Neighbour: No no you come inside with me.
>
> [Hannah]: Ignore this kids.
>
> [Silas]: Okay we're going to have to grab and go.

[85] At that point [Silas Evans] picked up [Olivia]. [The second neighbour] says "*No, no don't grab and go*", Ms [Evans] says "*Hey excuse me put my daughter down*." [Silas Evans] was holding [Olivia] as he walked away at pace. Ms [Evans] asked "*Put my daughter down [Silas]*" to which Mr [Silas Evans] answers, "*It's a safety intervention*." [Olivia] is heard saying "*No Mum*" and there is heard audible crying from the children.

[86] There is a skirmish but the outcome is that [Olivia] is placed by [Silas Evans] in Mr [Evans]'s vehicle. [Thomas] is removed from Mr [Evans]'s hold and taken next door by the neighbour. Near the end of the video the male neighbour says, "*By the way you are on my property too so I'm asking you now to leave my property*." [Silas Evans] replies, "*I don't know you. But I'm going to override that*." He was asked again to leave the property, "*I'm going to ask you to leave my property … oh, you're going to override that, ok*," to which Mr [Silas Evans] says, "*I don't know you*."

[87] This video shows a very disturbing situation. It does support Ms [Evans]'s contention that she did not consent to the children being taken from her care at that time. In cross-examination she indicated that she understood that Mr [Evans] was coming to her property. She had no idea that [Silas Evans] would also attend. For her that only raised the tension because she says she is fearful of [Silas Evans]. There would seem to be no reason why [Silas Evans] attended the property at that time and

certainly he had no right to behave in the manner that he did even if there were justifiable safety issues.

[88] The weight of evidence is that there is no justification for Mr [Evans] or his brother to conclude that Ms [Evans] had relapsed and that she was in fact under the influence of alcohol at that time. When asked about the allegation that she was slurring her words at this time, Ms [Evans] replied, "*I sound how I sound when I have a migraine in that I am very slow*." In response to the question as to whether Mr [Evans] had interacted with her before when she had had a migraine, her reply was:

> Yes I had – throughout our marriage I had a couple of migraines. The migraine that I had that day was exceptional which was the same as the very first migraine I ever had a couple of years before 'cos I've had different degrees of migraine. Some where I can barely function and others where I just need to lie in a dark room.

[89] Contrary to the self-serving assumptions made by Mr [Evans] and [Silas Evans], the Court has the evidence of the neighbours who said that they did not notice anything about her demeanour which would suggest that she was drunk. They were close enough to be able to have an opinion on that. The police who attended the incident did not report any observation that Ms [Evans] had been drinking. Ms [Evans] had told them that she had a migraine. Ms [Evans]'s mother attended the property after [Olivia] had been uplifted. She was asked in cross-examination whether her daughter smelt of alcohol. Her response that she had no concerns whatsoever. She confirmed that she was physically close enough to her daughter to know. The only reason she and her husband had stayed at Ms [Evans]'s home that night was because they were concerned that the [Evans] brothers might come back and try and take [Thomas] as they had taken [Olivia].

[90] It has suited Mr [Evans]'s cause to continue to maintain that he and his brother are correct about a relapse and all other witnesses are incorrect. However, having viewed the videos and observing both Ms [Evans] and her mother who answered questions in the witness box about the situation, and having read the affidavits of the neighbours, noting the police made no record of concerns about Ms [Evans] being drunk, the Court is certainly not satisfied that there has been any relapse.

Consequently, the only issue for the children on the evening of 17 March related to the effects that Ms [Evans] was suffering as a result of having a severe migraine headache.

[91] Comment needs to be made on Mr [Evans]'s attempts to give credibility to his claims that Ms [Evans] had relapsed. I will refer to two examples. First his criticism of Ms [Evans] not taking an alcohol test for five days after the 17 March. He alleges this was a deliberate action on Ms [Evans]'s part to avoid confirmation that she had relapsed. However, Ms [Evans]'s explanation for this delay is perfectly credible and ought to have given Mr [Evans] cause to consider his belief that there had been a relapse.

[92] Ms [Evans]'s evidence is that she did not appreciate the significance of giving a breath test on 17 March 2022 because she did not know that Mr [Evans] was going to withhold the children from her on the basis of an alleged relapse. She points to the fact that on 18 March 2022 Mr [Evans] confirmed to her in a text message that he would return the children to her on Monday, 21 March 2022 as previously agreed. It was not until Monday 21 March 2022 when she received a text from Mr [Evans] informing her that he would not be returning the children that she says she realised that Mr [Evans] was going to prevent her from seeing the children.

[93] On realising this she made an appointment with her doctor that day for a breath test but the first available appointment was the next day. She also called the Police Central phone line to ask for a breath test and was informed that they do not offer that service.

[94] Her evidence is that her first opportunity to attend on her doctor was 22 March. She asked her doctor the best way to prove her sobriety and the doctor recommended a breath test. She says that had she relapsed on Thursday 17 March 2022, there was no way that she would have returned a negative breath test on 22 March. In the past when she had relapsed she had been unable to stop drinking until she checked herself into a care facility. She said it was entirely inconsistent with how she had previously relapsed to have supposedly drunk alcohol on Thursday but been fine by the following Tuesday.

[95] Despite this, Mr [Evans] continued throughout the Court proceedings to claim that the delay was deliberate on Ms [Evans]'s part and was further proof that confirmed his belief of a relapse.

[96] A second example was in respect of the allegations made by Mr [Evans] surrounding the nanny's trip to the pharmacy on 17 March 2022. He expressed concern that the nanny was sent to Ms [Evans]'s doctors to pick up a heavy sedation prescription for five days such as Valium and diazepam. He claimed this was one of the only two ways for Ms [Evans] to recover from a relapse, either maintenance (tapering off alcohol) or strong prescription medication to make her sleep off the cravings. He claimed that both needed supervision to work and both make a person incapable of caring for young children solo overnight.

[97] Ms [Evans] says that on the afternoon of 17 March 2022 [the nanny] went to [a local pharmacy] to pick up a bottle of cough syrup for the children. Ms [Evans] was unwell and she says that as it was at the height of the Omicron outbreak she was concerned she did not have anything for the children if they were to get sick too. She denies that trip to the chemist was to pick up an emergency prescription of diazepam to assist her with recovery from a relapse. She has consistently said that this would require a very heavy dose of diazepam, not her weekly dose of five pills per week.

[98] There is no evidence to support Mr [Evans]'s assumption that the nanny had gone to the pharmacy for other than cough syrup for the children. Yet he continued to maintain this position to support his contention that there had been a relapse.

[99] The evidence shows that Mr [Evans] simply was not open to any other explanation than his assessment of the situation. This pattern of behaviour brings into question his credibility as it does suggest that this was all being done to enable him to assert control over the children.

[100] The actions of Mr [Evans]'s brother [Silas] tend to confirm that this was what was occurring. [Silas Evans] had no business to be at Ms [Evans]'s property on 17 March 2022. He certainly had no authority to take the stance he did which included

him making the decision to pick up [Olivia] to her distress and take her from the property to Mr [Evans]'s motor vehicle.

[101] Further video evidence shows [Silas Evans] imposing himself on a Facetime conversation between Ms [Evans], her mother and [Jeremy Evans] on 24 March 2022. The transcript of this Facetime conversation is in the evidence. During that conversation we have [Silas Evans] saying to both Ms [Evans] and her mother, Mrs [Bryant] when they were trying to discuss with Mr [Evans] what should be said to the children:

> [Silas] – it's [Silas] here [Hannah]. You need to grow up a bit.
>
> [Mrs Bryant] – Would you get off please. We are talking to [Jeremy].
>
> [Silas] – OK I'm here to supervise, it's up to me and my discretion where this call progresses and right now you are on your first warning. You are only going to get two.
>
> [Hannah] – Ok we're trying to have an adult conversation about how you would like me to communicate with the children please.
>
> [Silas] – Right, I'll say this to you straight and plainly. You are supposed by law, complete the mandatorily, the parenting separation course.
>
> [Hannah] – I've done this.
>
> [Silas] – Your lawyers have said in your written documentation you haven't.
>
> [Hannah] – I've done that. I've done the parenting through separation. I did that last year.
>
> [Silas] – If that's the case we don't understand why you don't understand the concept of adult issues.

[102] The conversation goes on at some length. The tone of the discussion is somewhat disturbing as it shows a picture of [Silas Evans] quite inappropriately treating Ms [Evans] and her mother in a fashion akin to a school teacher and a young pupil.

[103] Ms [Evans] has in her evidence said that she was aware of the control that [Silas Evans] was trying to exercise at this time and was endeavouring to reach out to Mr [Evans] to have a discussion as to what was expected of her so that she did not run the risk of these Facetime conversations being randomly stopped by either Mr [Evans] or his brother [Silas Evans].

[104] There was no right for [Silas Evans] to deal in this situation. There was simply no justification and it is that discussion and later involvements of [Silas Evans] which would justify the retention of the condition that was imposed by Judge Burns that the children not have contact with him. These interactions simply show that he has no insight into the needs of these children. Rather, it shows a behaviour pattern which is quite abusive.

The children

[105] Much of what has been occurring since 17 March 2022 has had little to do with what is in the best interests of these children. The Court needs to be conscious of the special needs of these children. [Thomas] has been diagnosed with autistic spectrum disorder (ASD). The diagnosis was made 6 April 2022. In Dr Claire Stanley, paediatrician's, report of 6 April 2020 she noted that [Thomas] presented with difficulty in managing his emotional responses, he displays emotional dysregulation and his behaviour is challenging. It was noted it is becoming increasingly difficult to find the right strategies with which to manage things both at home and increasingly at day care. He displayed some oppositional defiances, lack of flexibility and social communication difficulties. He does like to control the situation. Dr Stanley said that looking at the factors discussed in her first assessment in April 2019, as well as the difficulties referred to in her report, he meets the DSM 5 diagnostic criteria for a diagnosis of autism spectrum disorder with challenges around social communication in the context of restricted and repetitive patterns of behaviour.

[106] Ms [Evans], in cross-examination by Lawyer for child, updated the Court in respect of this particular issue. She said [Thomas] is still very prone to aggression out of the blue and that happens very frequently still. Not as frequently as it used to due to more awareness of his surroundings. He still has the inflexibility.

[107] The aggressive meltdown behaviours are predominantly seen towards Ms [Evans] and [Olivia]. He does not display aggression at school but he has been seen to hurt animals. His aggression quite often comes out of the blue. Examples were given. Ms [Evans] indicated her view in respect of the aggression was that she would monitor him closely all the time and will divert a tantrum becoming a meltdown.

[108] She expressed concern about [Thomas]'s attempts to hurt himself such as trying to hit his head on the downstairs bedroom tiles, putting his fingers into the wardrobe door and trying to slam it on them and frequently hitting his head against the wall or windows.

[109] In giving her evidence, Ms [Evans] demonstrated a good insight into the needs of her son [Thomas]. She described in some detail the difficulties she is experiencing with [Thomas]. She did not give any indication that she was holding back information which might be seen as a negative to her parenting. Rather, she said it as it was because she is of the belief that [Thomas] needs to be under the care of a paediatrician so that these issues arising from the diagnosis can be properly addressed.

[110] It is disappointing to see what has occurred in respect of [Thomas]'s need to see a paediatrician. Mr [Evans] has again seemingly procrastinated and that would seem to be the primary reason why [Thomas] has not been further assessed – an assessment that is seen as essential.

[111] Mr [Evans] has demanded a second opinion which caused delays and eventually did not happen. Judge Muir had to then hear an application for the appointment of a paediatrician. However, the paediatrician who was seen as a compromise appointment cannot see [Thomas] until next year. That is not acceptable.

[112] Mr [Evans], on the one hand, seems to be saying that the Court should not determine these matters until that further paediatrician assessment is done. But on the other, he is saying that he does not see any of these behaviours that Ms [Evans] speaks about. This leaves the Court with the concern that Mr [Evans] is paying lip service to [Thomas]'s needs in this regard.

[113] Both parents would have benefited from the continuation of a paediatrician in [Thomas]'s life.

The children's views

[114] In the usual way the children's views have been ascertained by the lawyer for child. When first appointed Mr Headifen spoke with [Thomas] by way of a Zoom link at his school. He reported that [Thomas] was aware there were differences between his parents and was very aware of himself not spending time with his mother. He was very clear that his sister was missing her mother (as was he). He was very matter of fact about telling Lawyer for child that his sister kept asking him "*When are we going to Mum's*?":

> When asked what were the good things about living with Dad he took a long time to think about the answer. He finally replied that he did not think there was anything good about living with his dad. When I asked him about his dad, he told me that he hit him. Lawyer for child asked him to "*tell me more about that*" and [Thomas] said "*No*" (he would not). "*When asked about the good things about his mum he told me that she did not hit them*."

[115] [Thomas] told Lawyer for Child that his dad did not do things with him whereas his mother would. Lawyer for Child went back to the issue of time with each of the parents and observed that [Thomas] was clearly worried about when he was going to see his mother. When asked about the number of nights he felt he would want to spend with his mother, he responded that he would want to spend four nights. When asked about the number of nights he would spend with his father he was quiet. Lawyer for Child held up four fingers and indicated that this was the number of nights that he wished to spend with his mother. [Thomas] then answered he would spend three nights with his father.

[116] Lawyer for Child at this time did not approach [Olivia] to talk to her because of her age and also because it was very clear from what [Thomas] had said that she was wanting to know when she would be spending time with her mother. Lawyer for Child has recorded that [Thomas] recalled the night that his sister went with his father and emphasised to me that he did not go but stayed with his mother. He had preferred to stay with his mother and in this part of the conversation he expressed his dislike for his paternal uncle. He was aware that his mother did not like his father talking to his father's brother.

[117] A further report from Lawyer for Child was filed dated 12 May 2023. Mr Headifen confirmed that he had met with [Thomas] at [his Primary School] on 8 May 2023. Before Mr Headifen could say anything, [Thomas] told him he knew he was

going to talk to him and that he was a lawyer. [Thomas] told Mr Headifen that had been thinking about matters and the care arrangement that he wanted was a week about arrangement with each parent. He then told me that [Olivia] had said that she wanted a year about with each parent.

[118] Mr Headifen stopped [Thomas] at that point and advised him of his role. Mr Headifen reports that [Thomas] was quite familiar with the fact that he was going to need to talk to him. [Thomas] then immediately told him about his and [Olivia]'s passport. He said they should be returned and that they were being held by the Court.

[119] Mr Headifen says that he then allowed [Thomas] to have a free narrative and let him speak about the matters he considered important.

[120] [Thomas] then told him about the "police night" (this was the day that the police came when there was a difference between his parents). He described it was a 'bad luck' day. He told me the reasons why it was a bad luck day. It was because one of his kittens had died. There followed a discussion about [Thomas]'s cats. [Thomas] then went on to explain the police night to Mr Headifen, that his mum had gotten sick. He then explained that his father had come across and his Uncle [Silas] had also come across. The police night was a recurring theme for [Thomas].

[121] [Thomas] returned to the care arrangements and he explained the current arrangement. He did find that the trips in the car going backwards and forwards to be tiresome. He said his best friend had left school in the last month and was either on holiday in Canada and was going to come back to New Zealand and then leave for Canada permanently. He told Mr Headifen he had not been in touch with her since she left.

[122] [Thomas] then went on to say that there were some differences between his mum and dad. The differences were that when he did something wrong accidentally, his dad would grab him and shout at him. He explained how his dad would behave by demonstrating on the front of his shirt where the buttons were. He said his mum would just sigh and say 'Oh [Thomas].'

[123] [Thomas] told me that they used to phone each day but his mother had made changes with the phone calls. His concern was that he could not call his mother when his dad was angry with him. Otherwise, he was not worried about the phone calls.

[124] [Thomas] then reverted back to the police night. On the police night he did say that he was scared. He said Mum was sick and he felt that she had called a work colleague. His father had come over and then his Uncle [Silas] came over. He described that Dad grabbed him and Uncle [Silas] grabbed [Olivia]. His mother came out and took [Thomas] back but [Olivia] got put in the car by [Silas].

[125] He later described to Mr Headifen that both [Silas] and his father had videoed the incident. At the end of the interview, he asked me whether I had seen the videos and he thought both his father and uncle had videoed the night. He subsequently described how he had gone to the neighbours and hid at the neighbour's house and the neighbours had become involved on the police night. Mrs Headifen observed that the police night was a repetitive theme and that clearly had had an impact on [Thomas] in that he recalls it frequently.

[126] When asked about the good things at Dad's house and the good things at Mum's, he indicated at Dad's there are good things and during the school holidays [his cousin] comes across and plays. They would go to [location deleted] and do bike rides and play on the trampoline.

[127] At his mother's the good things were that she kept the cats and looked after [Felix] when he was not there. He then talked further about his cats and how he really loved [Felix], but he still did love [Misty] and then he explained that [Misty] was a Russian blue. [Milo] was a "Tonkinese' brown" and [Felix] was a rag doll. He indicated that [Felix] has yet to be one year old but he could not remember his birthday.

[128] He then reverted back to the police night and talked about when the police came and that the police had spoken to his mother that [Olivia] was at his dad's home. He then explained that he knew all this information because his dad had told him. He also knew about the finances and he had learned this from his father. The fact that he was getting the information from his father did not worry him. He told me his mum

had four lawyers and his father no longer had one and that Mr Headifen was a lawyer paid by the Court and the Government.

[129] [Thomas] also shared a worry that he did not want his mother or father to marry someone else because he did not want another mum or dad.

[130] He went on to explain the various families and that on his father's side, his grandfather's wife had passed away. He explained on his mother's side that his grandmother and grandfather are separated and also re-partnered.

[131] He told Mrs Headifen that when he was born something had happened with him and he would most mornings go into bed with Mum and Dad and that he still does it. There were further discussions including discussions about members of the father's family and mother's family, special friends and a special uncle. [Thomas] then told Mr Headifen his father had told him that he was going to talk to Mr Headifen about what he had written down with him, to make sure that what [Thomas] had told me was accurately recorded by Mr Headifen.

[132] He indicated he felt sad about these things and did feel a little bit caught in the middle. However, he was more worried about his cats [Felix] and [Milo]. He did not want to get attached to the cats because humans outlive cats. He said that his cats would pass away before he did and he did not want to get too attached to them because then he would be very sad. At this point he mentioned he wanted to see his uncle [Silas]. He subsequently mentioned this twice more, that it was important for him to see [Silas]. This was mentioned amongst his discussions regarding the cats getting into fights and having to see the vet. When asked whether he wanted to talk to the decision-maker he did not answer and diverted back to the police night, reiterating what he had already told Mr Headifen.

[133] Mr Headifen met [Olivia] at her [early childhood centre]. The owner/manager of the centre sat with him during the discussion at the behest of [Olivia]'s parents. [Olivia] knew he was a lawyer. Mr Headifen explained that she did not have to speak to him and that she could refuse to answer any of his questions and that would be okay.

[134] [Olivia] wanted to speak with Mr Headifen and she opened that she knew what [Thomas] had said to him about the care arrangements and that he wanted week about. He then asked her what she wanted to do and she was uncertain and became shy and either did not know what she wanted or did not want to say. Given her age she was told it was alright not to answer Mr Headifen and diverted the conversation elsewhere.

[135] The discussion was very general. [Olivia] mentioned that there were days when she did not want to go to her father's home but a discussion was so generalised that nothing further was asked and nothing could be read into the statement. She indicated that she liked both homes. When asked about starting school, [Olivia] was uncertain.

[136] By way of observation, Mr Headifen in his report said that both children presented as being articulate in relation to their ages. [Thomas] did stim from time to time when he spoke with Mr Headifen. He made eye contact on occasion and most of the time he did not. Both children related well with him and appeared to be comfortable in the discussions with him.

[137] It has to be of concern that during these discussions [Thomas] continually returned to the "police night." He has obviously been negatively affected by it. Mr [Evans] must bear responsibility for this given his decision to act in the way he did.

Discussions

[138] The evidence before the Court is voluminous. It clearly shows a concerning power and control dynamic on the part of Mr [Evans]. He has sought to use a situation of his making to take control of the parenting of their children. He has not been prepared to step back and consider whether his assessment of the situation on 17 March was correct. He has jumped to the conclusion that there has been a relapse on the part of Ms [Evans] and has endeavoured to persuade the Court of this ever since.

[139] The evidence does not support this conclusion. The finding of this Court is that there was in fact no relapse. Consequently, Mr [Evans] had no justification for attempting to uplift the children that night against the mother's wishes. What has

followed that action has been an orchestrated campaign aimed at winning the Court battle. It is very apparent that in this action Mr [Evans] has lost the ability to focus on what is in the best interests of these children. Ms [Evans]'s actions on the other hand do demonstrate an appropriate focus on the needs of these children. She was able to display a good understanding of the children's present needs when cross-examined by Lawyer for Child. This particularly applies in respect of [Thomas]'s needs.

[140] One significant issue is how Mr [Evans] has dealt with the real health issues that exist for [Thomas]. He in his affidavit downplays this issue that exists. He claims that this dispute should not have [Thomas] on trial. He describes [Thomas]'s autism as mild and claims that none of the issues Ms [Evans] has identified occur when [Thomas] is in his care. This is difficult to accept. Mr [Evans] was part of the initial paediatrician's involvement and the paediatrician's report is on the basis that both parents reported the difficult behaviours. To now endeavour to minimise these and by implication criticise the children's mother is concerning.

[141] The delay in having the paediatrician appointed has not helped. Everyone would have been better informed if the report had been available. There are real concerns as to the delay that has taken place in this regard. Judge Muir in his minute of 26 August 2022 had noted at para [13]:

> It appears that all parties would agree to [Thomas] being seen by Dr Smith even if they do not necessarily agree on the function that Dr Smith would perform. I should record that I make no criticism whatsoever of Dr Stanley's care of [Thomas] to date. I am not in a position to do that; I have not heard any evidence about it. What is clear is that Dr Stanley has been [Thomas]'s paediatrician for a long period of time and is likely to have information about [Thomas] that would be invaluable to anyone preparing a report.

[142] At para [15] Judge Muir noted:

> The Court has decided that a report is the best source of information on [Thomas]'s medical needs and ASD diagnosis. It is also the most timely source of the information. It is likely to provide us with the best quality information that could be obtained, and it is likely to be cost efficient. It is important that there be no undue delay and I am going to leave it to Mr Headifen to manage the preparation and provision of the report to ensure that there is not any delay.

[143] Judge Muir, to overcome the impasse that had occurred because of Mr [Evans]'s objection to Dr Stanley, made directions that Dr Smith would prepare the report. As referred to above, Dr Smith then declined to do the report and Judge Muir on 10 November amended this order by consent so all reference to Dr Smith was removed and directed that the report writer instead was to be a paediatrician recommended to the Court by [Thomas]'s lawyer Mr Headifen.

[144] On 16 December Judge Muir further amended his order to record the agreement that the paediatrician was to be Dr Jamie Speeden. Mr Headifen was to contact Dr Speeden to advise him of the appointment and to tell him who [Thomas]'s previous paediatrician was. We now have the situation where Dr Speeden is not able to see [Thomas] this year. I am urged by Ms Crawshaw KC to resolve this issue.

[145] I have therefore considered the affidavit evidence of the parties to Dr Stanley's involvement with [Thomas] and Mr [Evans]'s objection to her continuing in that role. I do not consider the issue that arose in respect of [Thomas]'s reaction to the prescribed medication is a sufficient reason for Dr Stanley to be removed as [Thomas]'s paediatrician and I consider that she should be asked to urgently provide this report.

[146] The evidence is that there is a very limited pool of experts who are able to be called upon in respect of a situation such as [Thomas]'s. The issue has been delayed enough and therefore I am granting the oral application that has been made to ensure that this matter is attended to sooner rather than later.

[147] There is a real concern, given the totality of the evidence including evidence from some of Mr [Evans]'s witnesses, that Mr [Evans] wishes to minimise the autism diagnosis. That could be seen as irresponsible.

[148] The pattern of behaviour that Ms [Evans] explained to the Court in answer to Mr Headifen's questions are concerning and should not simply be swept under the carpet. Ultimately [Thomas] is going to benefit from a professional assessment of his needs. This is a view confirmed by Dr Sarah Calvert. Dr Calvert, in answer to questions on this issue, concluded:

> …but certainly you want to start with a paediatric review and then you might want to consider whether you've got a specialist neuropsychologist assessment after that.

[149] Given the history of this particular issue, I am minded to grant the application made pursuant to r 46R and to approve the draft order that has been provided by counsel for Ms [Evans].

[150] I cannot make findings against Mr [Evans] in respect of the use of physical violence against [Thomas] and [Olivia] without hearing from him under cross-examination. However, it is an ongoing concern. It is noted that in the video that is part of the evidence where Ms [Evans] (prior to separation) is discussing with Mr [Evans] his treatment of [Thomas], Mr [Evans] does not make any denial of the allegations that Ms [Evans] is discussing with him. These are serious allegations which one would have expected to hear denials from Mr [Evans] during that discussion.

[151] At this time because of the unsatisfactory way in which this hearing had to take place, that issue in my view cannot be resolved by way of findings. However, the other concerns that have been raised in respect of the bigger picture of safety, such as the emotional harm caused by Mr [Evans]'s conduct post 17 March 2022, are set out in counsel for Ms [Evans]'s submissions and referred to at para 37 above. There has been a flagrant disregard by Mr [Evans] of court orders to date. This has already been commented upon by other Judges with a warning been seen as being necessary by Judge Muir on 20 December 2022.

[152] In respect of Mr [Evans]'s concerns as to safety for the children with Ms [Evans], it is clearly apparent that Ms [Evans] is focused on avoiding a relapse. She has endeavoured to demonstrate to Mr [Evans] that he was mistaken in respect of his conclusion that a relapse had occurred on 17 March 2022. The information available is that in respect of previous relapses, these have only been able to be dealt with once Ms [Evans] has attended a residential programme. That has not occurred here. That would suggest that there had been no relapse. Ms [Evans]'s decision to take daily breath tests using the Smart Start In-Home device should not be overlooked given that at the time of the hearing she had administered the breath test 401 times always for a

negative result. That surely has to be seen as corroboration of her denial of the relapse. Mr [Evans], to his discredit, has tried to make issues of the technical failings that have occurred on two occasions. This is decidedly mean-spirted.

[153] The evidence given by Ms [Evans] in answer to questions by Mr Headifen demonstrates that she is fully engaged in steps to address her alcoholism. She engages with AA on a weekly basis. She said she has a home group which is her Tuesday night meeting at ACRON so that she engages with people from AA on a weekly basis using a What's App home group chat message. When she has the children on Tuesdays, she says she goes to another AA meeting. She is also involved in monthly meetings which include her as a panel leader and she attends as her group service representative Northern Area AA assemblies. She indicated she was regularly in contact with her sponsor and has engaged with a psychologist from time to time.

[154] Ms [Evans] was asked about the instances where there had been two pick ups in respect of the breath testing. She explained those situations in a credible fashion.

[155] Ms [Evans] generally impressed me in the way she gave her evidence. Her explanations were logical and ought to have been accepted.

[156] The evidence is not such that the Court is left with concerns about Ms [Evans]'s mental illness. She accepts that she is an alcoholic and that she has anxieties which cause stress, however the evidence does not satisfy the Court that these issues for her are not under control. She is available to care for these children and has been doing so under the shared care arrangement for well over a year now. This one would think would not be the situation if she had had a relapse.

[157] The totality of the evidence in this case does point to the fact these parties will not be able to engage in a shared care arrangement. What has happened since 17 March has demonstrated that there is not a will on Mr [Evans]'s part to co-operate unless Ms [Evans] does what he expects of her. I accept the submission made that Mr [Evans] has subjected Ms [Evans] to an onslaught of emotional and psychological (including litigation) abuse throughout these proceedings. It would not be in the

children's welfare and best interests for an order to be put in place which will allow that dynamic to continue. There is no sign of Mr [Evans]'s conduct abating.

[158] [Thomas] has special needs. This seems to have been minimised by Mr [Evans]. This raises a concern as to whether this will continue if a shared care arrangement is continued.

[159] I have come to the view, given the totality of the evidence in this matter, particularly the unhealthy dynamic that exists because of Mr [Evans]'s clear wish to dominate, that a shared care arrangement will not work long term for these children. Their needs are best met by a traditional primary caregiver being in place for them. This is best provided by Ms [Evans].

[160] The draft orders provided for consideration by the Court in my view meet the needs of these children arising from the dynamics that exist in this family relationship. I agree with the concern relating to [Silas Evans]'s involvement in this family. I consider the condition imposed by Judge Burns, that the children not have contact with [Silas Evans], remains in place. It will ultimately be for Ms [Evans] to decide if and when that condition can be relaxed.

'Active' applications

[161] Before confirming the final parenting orders made, there needs to be directions made as to the 11 applications that are still 'active' in the Court system. Counsel for the applicant was asked to address these in a memorandum after the evidence had been heard.

[162] Counsel's memorandum dealt with these 'active' applications in a table in her memorandum:

No.	Application	21 March 2022	Status
1	Ms [Evans]'s without notice application for parenting orders	21 March 2022	Dealt with at Pickwick hearing before Judge Burns on 12 April 2022 on interim

			basis and substantively at hearing 15 May 2023
2	Mr [Evans]'s on notice application for parenting orders	22 March 2022	Dealt with at Pickwick hearing before Judge Burns on 12 April 2022 on interim basis and substantively at hearing 15 May 2023
3	Ms [Evans]'s without notice application for parenting orders	23 Mar 2022	Dealt with at Pickwick hearing before Judge Burns on 12 April 2022 on interim basis and substantively at hearing 15 May 2023
4	Mr [Evans]'s application under s 46R	14 Sep 2022	Explained at paragraph 4.
5	Ms [Evans]'s appearance under protest to jurisdiction (listed as an application oi the Court application in the Court application list)	29 Sep 2022	Explained at paragraph 4.
6	Mr [Evans]'s without notice application for a consequence for the contravention of existing parenting orders (listed as orders relating to contravention in the Court application list)	20 Nov 2022	
7	Mr [Evans]'s without notice application for sole custody interim parenting orders	20 Nov 2022	Dealt with in the minute of Judge Tan dated 21 November 2022
8	Ms [Evans]'s without notice application for a warrant to enforce the interim parenting orders	22 Nov 2022	Dealt with in the minute of Judge Muir dated 23 November 2022
9	Ms [Evans]'s without notice application for interim parenting orders	19 Dec 2022	Dealt with in the minute of Judge Muir dated 20 December 2022
10	Ms [Evans]'s without notice application for a warrant to enforce the interim parenting orders	19 Dec 2022	Dealt with in the minute of Judge Muir dated 20 December 2022. Warrant to lie. May now be dismissed.
11	Application listed as parenting order in Court application list	20 Dec 2022	Appears to be a duplicate of Ms [Evans]'s without notice application dated 19

			December 2022 referred to at 9.

[163] As set out by counsel in this table above, the applications have been dealt with by the Court at various stages throughout the proceeding. They have been resolved as per the table. The only application that appears to be truly active is Mr [Evans]'s on notice application for guardianship directions and breach of Court orders/directions.

[164] On 29 September 2022, Ms [Evans] filed an appearance under protest to jurisdiction to this application on the basis that:

(a) many of the directions sought in that application were the subject of Ms [Evans]'s application for parenting orders dated 21 March 2023 and 23 March 2023 and Mr [Evans]'s application for a parenting order dated 22 March 2022 (to be determined at the substantive hearing);

(b) the directions were res judicata and had already been determined by the Court; and

(c) the remaining directions/orders sought by Mr [Evans] (that he should be the sole medical guardian of the children, that an interlock breathalyser be fitted to Ms [Evans]'s vehicles and that Ms [Evans] attending completed anger management course) would more appropriately be dealt with at the substantive hearing.

[165] Ms [Evans]'s position is that the orders and directions sought by Mr [Evans]'s set out in para [164] (a) to (c) above should not be granted for the reasons addressed in Ms [Evans]'s opening submissions dated 24 April 2023.

[166] I agree with that submission. Mr [Evans] is not to be the sole medical guardian of the children. There is no need for an interlock breathalyser to be fitted to Ms [Evans]'s vehicles and there is to be no direction that Ms [Evans] attend and complete an anger management course. This follows on from the findings that I have made in respect of this parenting arrangement. It also further highlights the unhealthy focus

that Mr [Evans] has had on trying to impose his will on Ms [Evans] when it is not appropriate or necessary. It adds to the picture of both Mr [Evans] and [Silas Evans] engaging in a concerted gaslighting exercise against Ms [Evans]. This further highlights the need for the type of orders that Ms [Evans] seeks. The Court would have no confidence in Mr [Evans] being able to co-parent these children in a shared care arrangement as there has been no sign of this campaign against Ms [Evans] abating.

Court orders

[167] Having considered all the evidence in this matter, it is important that final orders be put in place now. These children have been left in an unsatisfactory situation since March last year and the orders proposed by Ms [Evans] in my view provide the best opportunity for these children to be able to get on with their lives without continuing to be in the middle of the onslaught of emotional and psychological abuse that is evident throughout these proceedings.

[168] A final parenting order is therefore made in terms of the draft order filed by counsel for the applicant with her opening submission. Also, the order sought in the oral s 46R application is made in terms of the draft order filed.

[169] Counsel for the applicant is to file submissions as to costs within 7 days. Mr [Evans] will then have seven days to reply. The issue of costs will then be dealt with on the papers.

Dated at Auckland this day of

I A McHardy
Family Court Judge