EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

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IN THE FAMILY COURT
AT LEVIN

FAM-2013-031-000044
[2017] NZFC 2038

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[CHARLIE MAY] Applicant
AND	[ELLIE JOYCE] Respondent

Hearing:	1 March 2017
Appearances:	Mr G Bodle for the Applicant Mr R Lewis for the Respondent Ms Bateman as Lawyer for Child
Judgment:	29 March 2017

RESERVED JUDGMENT OF JUDGE J F MOSS
[As to admonishment and contempt]

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[1] Contempt and admonishment proceedings commenced in August 2016 after [Kiera]'s mother covertly relocated two and a half hours north of her home to a remote rural area to reside with her new husband. The move occurred between day one and day two of a hearing before me related to the father's contact with [Kiera] (then aged 3 years 10 months). These proceedings have been long running, intricate and dynamic in terms of escalating allegations against the father and unstable, but

generally decreasing, contact for the father with the child. Early in proceedings a psychological assessment concluded that she had a sound and strong attachment with her mother and half sisters, and also that:

> She quite clearly appears to have established a relaxed and positive emotional and psychological attachment to both her father and [her step mother]… It would appear then, that this child has developed a number of attachments and I am of the opinion that the attachment she has with her father could be strengthened if contact was gradually moved from three to two weekly.[1]

[2] On the eve of Court process to consider implementing the recommendations of the assessing psychologist, Mr Watson, the mother sought to suspend access, pleading that the father had sexually assaulted the child. Contact ended. Months of investigations ensued. There were criminal proceedings in relation to the father unrelated to this child, but raising questions about his capacity to safely parent her care. Supervised contact began with a Court approved agency around May 2016. Contact moved from there as a result of the decision after hearing in July and August 2016.[2]

Relocation

[3] In December 2015 the father sought an order without notice to prevent the mother relocating to [location 1]. She was seeking to relocate to live with her then partner. She filed an affidavit on 21 December saying that she has decided not to relocate from [location 2].[3] She said:

> [Charlie] has no basis to fear I would relocate [Kiera] without his knowledge or consent. We have also fully discussed this topic in counselling. Without going into any detail, I relayed through the counsellor I would not relocate [Kiera] without [Charlie]'s knowledge or consent, and that I understood my obligations in this regard.

Later in the same document:

> I own my own home in [location 2]. I would not move on a whim, there would have to be serious consideration and planning, including notifying [Charlie] and reaching an agreement. There is no urgent/immediate need for an order to be made. I do not agree such an order would be in [Kiera]'s

[1] Report of John Watson 21 August 2015, paras 123 and 124.
[2] Judgment 16 August 2016.
[3] Affidavit of [Ellie Joyce] 21 December 2015, para 5.

> interests in circumstances where I have always facilitated contact suitable to [Kiera].[4]

[4] When the Court next considered the matter, the father confirmed that he did not seek an order, and the application was accordingly adjourned. It remained current.

[5] The parties appeared in the Family Court on a variety of pre-hearing conferences between December 2015 and July 2016. On 19 July 2016 a hearing began to determine the father's contact with [Kiera]. The hearing was adjourned part heard to 8 August. The mother's [details of other children deleted] ceased their enrolment on [date prior to 19 July hearing deleted] at their local school (the end of term two). The school confirmed to Ms Bateman, Lawyer for Child, that the children were moving to the [location 3] area.[5]

[6] On 11 July 2016 the mother filed a long affidavit, which set out detail of her profound opposition to the father having contact with the child. She based her opposition on the following propositions:

- There was a suspicion that the father sexually assaulted [Kiera] sometime in 2015, based on the mother's observation of the child, her regressive behaviour and her masturbating behaviour.

- The father had [details of past sexual assault offending and conviction deleted].[6]

- The mother had experienced the relationship with the father as an adult as being abusive of herself. The mother did not refer to her imminent move, nor to her imminent marriage.

[7] The mother's affidavit was, to some extent, supported by an affidavit of the same date of her former husband, the father of [Kiera's half-siblings]. Although at that point I infer that the [childrens'] father had agreed to their relocation to [location

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[4] ibid para 13.
[5] Email from [school name deleted], [location 2]. Addressed to Lawyer for Child, 4 August 2016.
[6] [CRN numbers removed]; alleging offending between October 1994 and October 1996.

3], because of the school's confirmation that they had left the [location 2] school to move, he did not refer to that change in circumstances.

[8] During the evidence before me, on 19 July the mother made no reference to her new living circumstances.

[9] On 4 August the father applied urgently for an order requiring the return of the child to the [location 2] area. He had discovered the relocation. An order was made without notice requiring the child to reside within the [location 2] area in a suitable home and to resume her enrolment at her preschool. The hearing reconvened on 8 August. At that time the mother confirmed that [Kiera] was re-enrolled at the previous daycare and was attending on 8 August. As at 5 August the Centre manager had confirmed that [Kiera]'s enrolment ceased on 19 July. The enrolment details for [Kiera] (completed in [month deleted] 2015) had no information about the father's name. That section of the enrolment form was noted "N/A". Her recorded preferred name was different to her given name.

[10] The father filed a further affidavit on 15 September 2016 referring to progress which, by then, had been made with contact and referring also to difficulties with the child's attendance at preschool. Although she had attended the preschool on 8 August, she had only attended one other [Weekday 1 – day deleted] during August. She was absent without information once and was ill once. The father believed at that point that there had been no real attempt to re-enrol [Kiera]. He referred to the part-time attendance as a "smoke screen."[7]

[11] The father also noted that he had been offered a further day of enrolment for [Kiera] at the daycare. The Centre confirmed that because the mother had enrolled [Kiera] it was she who must confirm it. Initially, the mother did not confirm that attendance, but did so later. The context, motivation and reasoning around that formed part of the oral evidence before me.

[12] Part of the Court order on 4 August required [Kiera] to reside in [location 2]. The father's evidence on 15 September raised questions about whether the mother

[7] Affidavit of [Charlie May], 15 September 2016, para 25.

was indeed living in [location 2]. He referred to covert contact with the landline contact for the mother in her new location, which appeared to confirm the mother's presence away from [location 2] in the first week of September. It appeared to the father, during that week, that the mother was not residing in her home, and indeed that other people had moved into it. The mother has later confirmed her previous home was tenanted from [date deleted] September 2016. The father pursued his application for admonition and for a finding as to contempt.

[13] Since that time the mother has also borne a new baby[details deleted]. In this time, being late September, the [other children] returned to [location 2] and re-enrolled in school there. Up until that time, that is for much of term three, they were residing in [location 3] and going to school there.

[14] The mother's evidence is that she was residing in the [location 2] area with [Kiera]. She provided corroborating evidence in the form of confirmation of enrolment at the childcare centre and meetings with her midwife.

[15] The childcare centre manager, Ms [French], gave evidence before me on 1 March. She said that there were no additional spaces for enrolment for [Kiera] after the [Weekday 1] enrolment, which began on 8 August, until [an additional weekday – weekday 2 – day deleted] slot available in October. The father believed that the offer was for a place on [date deleted] September, which was a [weekday 2]. The centre manager's recollection was that the offer was for a [weekday 2] place starting in October. She is quite sure that a place was not available in September, because no children were leaving, and the centre was full. She said that she offered the mother the [weekday 2] slot, during a passing conversation at pick up. In the mother's evidence she said that she preferred not to use the [weekday 2], because of the child's sleeping arrangements. Ms [French] confirmed that and said that the mother said that if another child wanted the space then let them have it. Later, the mother confirmed that [Kiera] would have the space.

[16] I am satisfied that as at 8 August, the mother had re-enrolled [Kiera] at the daycare centre. In the [duration deleted] between her last day ([date deleted] July) and her resumed first day ([date deleted August), the availability of childcare to this

place reduced from three days a week to one day a week. That matter was beyond the control of the mother and of the Court. In terms of technical compliance with the order, I am satisfied that the mother did comply with that order as at 8 August.

[17] I am also satisfied that there was a conversation with the father and the daycare manager early in September about a new place for [Kiera]. However, I accept the evidence of Ms [French] that the offer was a place in October and not in September. I do not consider the father has lied about this. I conclude he was mistaken. This happens. There was understandable significant stress and distress for the father around this issue. The mother's unilateral move had profoundly affected, in a negative way, the child's proper access to preschool education. That impacts on her interests in a negative way. But it does not amount to a breach of the Court's order of 4 August.

[18] In relation to the residence condition, the mother's evidence was that by the time the Court made the order of 4 August she had moved to live with her husband. She said that she had not actually moved on 19 July, but I have clearly found that her commitment to move was complete by then. In particular, the children's enrolment in the local school in [location 2] had ended. The mother confirmed in evidence that she tenanted her home early in September. When the order to return [Kiera] to [location 2] was made, she returned with [Kiera] to reside at [a close family member]'s home. She said, and I accept, that she could not afford to maintain two households. But what followed was a period of unstable residing for this three year old. She lived at her [close family member's]. The midwifery records and the preschool records confirm that. She did, however, also travel to reside for several days each week with her husband. Her older children were at school nearby. The marriage was brand new. Binding a step-family is complicated, and I accept that the mother's obligations placed her in a serious bind. This was of her making. Although she complained in her notice of response that she felt that the move was necessary for the wellbeing of her family, and although she complained in oral evidence that she felt the need to move because the father was "stalking" and "harassing" and "watching her movements", the move was a serious error of judgment, which has impacted adversely on [Kiera].

[19] Reading the father's evidence and the efforts he took to secure the legal and factual basis for a reasonable connected relationship with his daughter, I do not construe the actions as stalking and harassing. Sadly, the mother's trenchant attitude which was completely opposed to the father seeing the child at all,[8] has caused the father to become more focused and determined to secure this relationship than typically occurs in these proceedings. However, in light of the mother's actions since these proceedings began, I consider that his determined and focused response is no more than a reasonable response to the mother's unreasonable point of view.

[20] However, during evidence before me on 1 March 2017 the mother said that she now considers that she made a grave error in moving as she did, and she tendered a complete apology. When challenged about whether she considers the father was to blame for this predicament, she was clear and specific that the only person who holds responsibility for this predicament is herself. I accept her apology. But it does not resolve or absolve the adversity.

[21] Having traversed the facts, it is necessary to consider the legal position both in relation to contempt and admonition.

[22] The Court's power to admonish a party appears in s 68 Care of Children Act. This reads:

> In order to have the authority to admonish a parent, the Court must be satisfied that a party to the order has contravened it.

[23] The Court's order reads:

> The child's place of residence shall be [address in location 2 deleted] or other suitable residential address within the [location 2] town boundary until further order of the Court. [Kiera] is to continue to attend the childcare facility that she has been enrolled in while living in [location 2] previously, and should recommence attending no later than 8 August 2016.

[24] It goes without saying that the Court cannot bind an educational institution to receive a child for attendance.

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[8] Affidavit of [Ellie Joyce], 11 July 2016.

[25] In order to satisfy the Court that the mother has contravened the order, the Court must be satisfied that the child was resident at a "suitable residential address within the [location 2] town boundary." The Court must also be satisfied as to the enrolment at her former childcare centre.

Father's Submissions

Mr Lewis urged the Court to take care to apply the legislative provision in its limited form, and not to go beyond those limits, despite the Court's openly expressed displeasure with the mother's move. Mr Lewis focussed the Court's attention on the exact actions, which, he said, amounted to compliance with the order. He resisted the submission that the relocation amounted to contempt, given there was no Court order preventing relocation.

Mother's Submissions

[26] Mr Bodle relied on substantive non-compliance, on the failure to resume the prior home, the failure to accept a new day which the day care offered. He sought a finding of contempt, based on the mother's own assurance, in December 2015 that she would not relocate unilaterally, and that she understood her obligations to the father.

Lawyer of Child Submissions

[27] In relation to the admonishment and contempt matter, Ms Bateman did not take a firm stance. Rather she urged the Court and Counsel to retain a focus on the present and future needs of the child, which had been compromised by the sudden move away, and the intensity of ongoing litigation. She expressed concern also about ongoing problems with the sustainability and development of contact.

Outcome

[28] Having canvassed the evidence in relation to residence, I am not satisfied that the child was at a "suitable residential address within the [location 2] town boundary" for some months after that order was made. The memorandum of the Lawyer for Child dated 27 October 2016 is revealing. [Kiera] considered she was at

home in five different places, four of them within the mother's care. Ms Bateman concluded that [Kiera] was "confused" about where home is.[9] At that time, Ms Bateman confirmed with the mother that she, [the new baby], and [Kiera] would be staying with her [sibling] in [location 2].

[29] Since that time, the mother has confirmed that she has arranged with [alternative living arrangements in location 2 deleted]. From that point (early December), I consider that the order of 4 August was fully complied with. However, I also accept that the mother had not before that been in a position to fully comply. This arose from her own doing. I do not consider that the mother did comply with the 4 August order until sometime early in December. She did have available options, including resuming living in her own home, although there were practical problems with that option. There were, however, complex conflicting demands on her because of the new baby. I do not consider this to be a serious contravention, but it is a contravention. While it may appear unreasonable that the Court would require the mother to re-establish a suitable residential address at a moment's notice, that arose only because of the mother's unilateral action, which she had previously sworn she would not take, an assurance the father relied on. Had the father not acted reasonably in relation to the mother assurance, an order preventing relocation would have been made.

[30] I consider it necessary to record a formal admonition of the mother, and I now do that.

[31] Although there are other enforcement consequences available in s 68 COCA, upon proof of the contravention of an order, I do not consider that these are proper in this case. In particular, a warrant would serve no useful purpose, and requiring a bond of the mother renders more complex the future conduct of these proceedings, because I accept that the mother is not in a strong financial position.

[9] Memorandum of Lawyer for Child, 27 October 2016, para 21.

Contempt

[32] The power of the Court to invoke the contempt jurisdiction is historically divided between contempt in the face of the Court and contempt beyond the face of the Court. The District Court Act 2016 came into force the same day as I heard this matter. Section 212 District Court Act provides for contempt of court This reads:

> **212 Contempt of court**
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> (1) This section applies if any person—
>
> (a) wilfully insults a judicial officer, Registrar, officer of the court, juror, or witness during his or her sitting or attendance in court or in going to or returning from the court; or
>
> (b) wilfully interrupts the proceedings of a court or otherwise misbehaves in court; or
>
> (c) wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings.
>
> (2) If this section applies,—
>
> (a) any constable or officer of the court, with or without the assistance of any other person, may, by order of a Judge, take the person into custody and detain him or her until the rising of the court; and
>
> (b) a Judge may, if he or she thinks fit, sentence the person to—
>
> (i) imprisonment for a period not exceeding 3 months; or
>
> (ii) a fine not exceeding $1,000 for each offence.
>
> (3) Nothing in this section limits or affects any power or authority of the court to punish any person for contempt of court in any case to which this section does not apply

[33] The claim in this matter relates solely to contempt beyond the face of the Court. The conduct of the parties in this matter, in the courtroom, has been exemplary.

[34] Until 1 March 2017 the contempt jurisdiction in the Family Court derived from the District Courts Act 1947. This legislation applies to the conduct which the Court is considering.[10] The District Courts Rules 2014 relating to contempt apply to

[10] Schedule 5, clause 5, which stipulates proceedings pending or in progress in a court prior to the

the Family Court: see r 214 FCR and *R v Hill* [1986] CLR 457. Contempt powers in the Family Court beyond the face of the Court were thoroughly analysed in the High Court *KLP v RSF (Contempt of Court)*[11]. There it was held that contempt powers that extend beyond contempt in the face of the Court had to relate to proceedings before the Court. Apparent breach of the Court's order may not be punishable by contempt unless there were extant proceedings, and the Court order was obviously and deliberately ignored. The High Court held[12] that the power of the Court to invoke the contempt jurisdiction away from the face of the Court derives from s 41 of the District Courts Act. In that section the Court had a power of general ancillary jurisdiction to grant relief, redress or remedies ought to be granted or given in a like case by the High Court and "in as full and as ample a manner."

[35] The new section defines and limits this category of contempt in terms of s 212(1)(c). It is unclear whether the general catchall in s 212(3) applies to this matter. Here, a party has confirmed on oath that she would not act in a way in which the other party sought to restrain by Court order, and that party then acted in that way, leaving the other party without a Court order, because that party relied on the assurance. Whether the behaviour of the misleading party is sufficient to constitute a contempt is unclear.

[36] The Court has incorporated a best interests of the child test to s 41 District Courts Act 1947. A similar gloss logically applies to the Family Court exercise of the power of contempt, because the Care of Children Act, which is the legislation in which this litigation arises, requires the Court to only exercise a power under the Act giving paramountcy to a child's welfare and best interests.

[37] I consider that these events have arisen in the course of the proceedings. I consider that the mother's actions have impacted in a significantly adverse way on the child, bearing in mind the escalation in litigation, the instability in the child's residence and the loss of stable preschool education.

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commencement of the 2016 Act continue to be enforced only under the former Act.

[11] *KLP v RSF* [2009] NZFLR 833 per Joseph Williams J.

[12] *KLP v RSF* [2009] NZFLR 833, Joseph Williams J.

[38] However, I am not satisfied that the Court has a residual power to find and punish for contempt in the terms defined within s 41 District Courts Act. She did not act in contravention of any order or direction. Although the Court in *KLP v RSF* confirmed the full and ample boundary on the power of the Court, no counsel referred me to the exercise of this power in the absence of an order or direction. That absence is, in my view fatal to the claim, despite my clear view that the father relied on the mother's sworn assurance, and agreed to adjourn his application accordingly.

[39] The request for a finding of contempt must, therefore, be dismissed.

J F Moss
Family Court Judge