

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

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**IN THE FAMILY COURT
AT AUCKLAND**

**FAM-2013-004-002838
[2018] NZFC 5094**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN [LYNN HORTON]
 Applicant

AND [HOMER BURKE]
 Respondent

Hearing: 22 May and 9 July 2018

Appearances: S Timaloa for the Applicant
 K Buchanan for the Respondent
 M Headifen as Lawyer for the Children

Judgment: 9 July 2018

ORAL JUDGMENT OF JUDGE A M MANUEL

[1] The parties, Ms [Horton] and Mr [Burke], have [number deleted] children. [Connie] was born on [date deleted] 2006. She is 12 years old. [Details deleted]]. The parties separated some years back but they both are still guardians of their children. They must reach agreement about guardianship decisions, such as where the children go to school.

[2] Sections 15 and 16 of the Care of Children Act 2004 (COCA) apply. (Copies are attached).

[3] Section 16(5) of the COCA provides that:

.. in exercising ... the duties, powers, rights, and responsibilities of a guardian in relation to a child, a guardian of the child must act jointly (in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child.

This provision is included in all standard form Court parenting orders.

[4] In February 2018 the mother decided to change [Connie]'s school from [school 1 deleted] to [school 2 deleted]. She did not obtain the father's consent.

[5] On 22 February 2018 she applied without notice to the Court for a guardianship order that [Connie] attend [school 2]. The Court declined to make the order on a without notice basis. Instead, the application was put on notice with time abridged to two days for a notice of response to be filed. The Court noted that it was only just recently that an offer of a place at [school 2] in 2018 had been made and the situation had become urgent. A hearing was directed. Lawyer for child was appointed. The registrar was to arrange an urgent date for a directions conference. The school was requested to hold a place for [Connie] until either agreement was reached or a Court decision was made.

[6] The application was not served until March 2018. The father filed documents in opposition. The matter came before the Court in April 2018. It was at about this time that the father learned that [Connie] was already attending [school 2]. He withdrew his opposition. [Connie] had become estranged from her father (for reasons quite apart from the schooling issue). He also reluctantly agreed to suspend contact with his daughter pending receipt of a psychologist's report.

[7] On 22 May 2017 there was a hearing to consider an application by the father under s 68 COCA and whether the mother was in contempt of the Court. Since then, further submissions have been filed by the lawyers and I am about to give my decision now.

[8] The question to be decided is, *Should the mother face any sanction for breaching the father's guardianship rights and/or breaching an order or decision of this Court?*

Background

[9] Between October 2014 and May 2017 the children were in the week-about care of their parents. This arrangement had been agreed by them at a settlement conference.

[10] In May 2017 the mother applied without notice for an interim parenting order granting her the day-to-day care of the children. An interim parenting order was made. The main reason behind her application was a claim that the father had physically and sexually abused [Connie]. The May 2017 orders were sealed, with the standard s 16(5) COCA inclusion about guardianship matters.

[11] In September 2017 a two-day hearing was held to decide interim contact between the father and the children. The Court held there was insufficient evidence to find that the father had either physically or sexually assaulted [Connie]. All the existing parenting orders were discharged and fresh interim parenting orders were made. These provided that father was to have contact with the children every second weekend. The basis on which he was to have contact with each child was different.

[12] At para [54] of the 29 September 2017 decision the Court found that:

The reality in this case is that there has been a high level of parental conflict over a number of years that has impacted on the children's emotional wellbeing in a seriously detrimental way. Both children have behavioural and psychological issues. The parents struggle at times to deal with the children's behaviour. The mother very likely has unresolved issues associated with her past sexual abuse. The parents do not communicate effectively, if at all. If they do communicate it ends with an argument. **The mother does not consult the father about guardianship issues and decisions.**

(Emphasis added)

Application under s 68 COCA/Contempt of Court

[13] I turn now to the application by the father under s 68 COCA and the contempt of Court issue.

[14] Factually and legally, there is much that the parents agree on. The mother acknowledges that she sent her daughter to [school 2] without the father's consent and in the face of a decision of the Court to place her application on notice. She concedes

that she acted in breach of the father's guardianship rights and an order of the Court. But she considers her actions were nevertheless in her daughter's best interests. She apologises to the Court and asks that if any sanctions are imposed they are reasonable.

[15] For his part the father is not seeking admonishment, a bond, nor reimbursement of any costs incurred.

[16] Lawyers for both parents accept that the High Court decision *KLP v RSF* applies,¹ and the Family Court has the power to punish for a breach of any order of the Court. The lawyers for both parties submit that the issue should be approached by way of the COCA. The reasoning is that there is a remedy available under s 78 COCA (copy attached) for a breach of a parenting order. They argue that the Court does not need to look further – to ss 16 and 212 of the District Court Act 2016 (DCA) (copies attached) or to its powers of contempt - for a remedy.

[17] The argument advanced by both lawyers is that the September 2017 parenting orders included s 16(5) COCA as a term of those orders (notwithstanding the fact that the October 2017 orders were not formally sealed). It is submitted that this is included as part of all parenting orders and it constitutes a term and not merely explanation or background. Hence, when the mother sent [Connie] to [school 2], she was in breach of a term of a parenting order and in contravention of s 78(1)(a)(i) of the COCA. Section 78(2)(a) and (b) of the COCA provide that a person who commits an offence is liable on conviction to either a term of imprisonment not exceeding three months, or a fine not exceeding \$2500. Section 78(3) COCA provides that nothing contained in the section limits the power of a Court to punish a person for contempt of Court.²

[18] Lawyer for child submits that there is difficulty in a COCA approach. The issue fundamentally concerned schooling, which is a guardianship matter and not a parenting matter.

¹ *KLP v RSF* [2009] NZFLR 833, (2009) 27 FRNZ 603.

² The problem with arguing that the breach falls under s 78(1)(a)(ii) is that no guardianship order was made under s 40 or 46R of the COCA. The decision made was to place the mother's February 2018 application on notice.

[19] *KLP v RSF* also concerned a guardianship matter. The father had been directed to send a child to a particular school but he refused to comply. The Family Court held at first instance that the COCA did not provide a remedy for the breach in question.³

[20] The Family Court referred the following question to the High Court for an answer: *Does the Family Court have the power to punish a person for contempt beyond the face of the Court?*

[21] The High Court held that the answer was yes.⁴ While none of the tools available to the Family Court in respect of enforcement of the COCA were available in the circumstances of the case:

[18] ... I do not however think this necessarily implies that the legislature intended the Family Court to have no enforcement options at all in guardianship matters. All that can be concluded from this different treatment of parenting and guardianship orders is that in respect of the latter there are no specifically designed enforcement tools.

[22] The argument that a schooling issue constituted a breach of a parenting order, rather than a breach of a guardianship order made under s 40 or 46R COCA, as has been advanced in this case for the reasons at [17], was not made in *KLP v RSF*.

[23] Lawyer for child expanded on his submissions about the difficulties framing the breach as a breach of a parenting order rather than a breach of a guardianship order, by doubting that the s 16(5) COCA inclusion was a term of parenting orders. He pointed out that the s 16(5) COCA statement was included in the standard form for parenting orders under the heading “Effect of a Parenting Order”. The form provided an explanation for some matters. This was one of them. Section 55(1)(b) COCA provided that a parenting order must be accompanied by general information and the s 16(5) COCA statement provided a part of the general information, but was not a term of the parenting order itself. Consequently, the mother’s breach was not a breach of a parenting order.

³ At the time *KLP v RSF* was decided, the COCA did not provide remedies for breach of guardianship orders. This was later remedied by amendment to the legislation.

⁴ At [52] specifically the answer was “*The Family Court does have the power to punish a person beyond the face of the Court but only where such punishment is for refusal to comply with an order of the Court.*”

[24] I accept lawyer for child's submissions for the reasons he advanced. This was not a breach of the September 2017 parenting order.

[25] Lawyer for child argues that the mother nevertheless was in breach of a decision of the Court to decline a guardianship order and to direct that the schooling matter should proceed on notice. When she sent [Connie] to [school 2] and continued to send her there despite everything that had happened, she effectively ignored the Court's decision and sabotaged the Court's directions to have the application resolved on notice.

[26] I accept this argument and conclude that the breach was a breach of father's guardianship rights, as well as a breach of the Court's decision and directions of February 2018, but was not a breach of the October 2017 parenting order itself. In these circumstances, COCA remedies are not of assistance.

[27] There may be jurisdiction to hold the mother in contempt under ss 84 and 112 of the DCA. In *KLP v RSF*, which I have already mentioned, the High Court considered s 41 District Courts Act 1947. The District Courts Act 1947 has since been repealed and replaced with the District Court Act 2016. The new s 84 DCA is, to all intents and purposes, a replacement of the old s 41 and the new s 212 DCA provides tailored relief for contempt in the face of the Court, and possibly more widely.

[28] Section 16 Family Courts Act 1980 (FCA) incorporates the DCA provisions I have referred to into the COCA. Section 84 DCA (copy attached) provides that a Judge in a proceeding may, in the same way as a Judge of the High Court in the same or a similar proceeding, (a) grant remedies, redress or relief, (b) dispose of the proceeding, (c) give effect to every ground of defence or counterclaim, whether legal or equitable.

[29] Section 212 DCR relevantly provides under subs (1)(c) that if any person wilfully and without lawful excuse disobeys any order or direction of the Court in the course of the hearing of any proceedings, the Court may, if the Judge thinks fit, sentence the person to imprisonment for a period not exceeding three months, or a fine not exceeding \$1000 for each offence. Subsection (3) provides that nothing in the

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.

[30] I return to the High Court case *KLP v RSF*. I am satisfied that although the statutory scheme has changed, the analysis in the *KLP v RSF* case continues to be relevant. The principles can be summarised as follows:

- (a) The contempt must relate to a proceeding before the Court. It cannot extend to matters unconnected to the relief, redress or remedy granted in respect of particular proceedings.
- (b) Punishment for contempt must be reasonably necessary in the context of the statutory objective and the facts of the case. It must be sufficiently significant for the Court to adopt the serious option of punishment for contempt.
- (c) The Court must be in a position to conclude that the alternative enforcement options are not appropriate in the circumstance, for example, due to delay or cost. (Examples of other enforcement options may include referral to the Solicitor-General for prosecution or an application to the High Court, but it will be clear from the circumstances I have outlined that these other alternatives are not reasonably available here.)

[31] So, should the Court exercise its powers of contempt? In his submissions, lawyer for child queried whether s 212(1)(c) DCA could apply. This is because there is a question mark over whether the disobedience took place in the course of the hearing of any proceedings. The issue is whether this extends to the life of the proceedings or is more confined; that is, to the hearing during which the matter was before the Court. In my view the latter applies. Had the legislative intention been to widen the section, the words would have read “in the course of the proceedings” rather than “in the course of the hearing of any proceedings”. However, s 212(3) DCA still applies.

[32] During the hearing, mother's lawyer attempted to draw a distinction between the mother's desired consequences (which were to send her daughter to [school 2]) and the undesired consequences (to breach a Court order) of her actions. However, the Court of Appeal decision *Police v K*⁵ is authority for the proposition that if a defendant deliberately does an act which breaches or prevents compliance with a COCA order knowing that this will result in the order being breached, there is no need to prove an added element or intention that the defendant's motive or purpose was to breach the order.

[33] *Police v K* concerned the breach of a parenting order rather than a guardianship order or direction, but it is also applicable to a breach of a guardianship matter and the directions made to implement a hearing on notice.

[34] Before making a decision I must also consider:

- (a) the general sections of the COCA which enjoin me to consider the welfare and best interests of the child (s 4) and the six relevant principles in s (5); and
- (b) whether the mother's breach is proved beyond reasonable doubt. I find that it is. (I further record that both parties were afforded the opportunity to give evidence during the hearing.)

[35] The relevant issues here are:

- (a) guardianship decisions, which should be made by both a child's parents, and
- (b) [Connie]'s relationship with her father, which has become estranged.

[36] Lawyer for child submits that there is a risk of more estrangement from her father if her mother is found in contempt of the Court and is punished. If the

⁵ *Police v K* [2011] NZCA 533.

punishment is an order for costs, there could be an impact on the family and the child is living in her mother's day-to-day care.

[37] On the other hand, however, there is the risk of [Connie] and her [sibling] receiving a message that Court decisions and directions are only to be complied when it suits, and when it does not suit they can be disobeyed with no consequence. Moreover, the mother is [details deleted] which may lead on to her seeking admission as a barrister and solicitor. She and the children need to know that lawyers and would-be lawyers are held to a higher standard of complying with the law than ordinary citizens. Lawyers should be law keepers, not law breakers. This is a message which the children need to hear and understand.

[38] In evidence the mother said that she was in a position to pay a modest fine by instalments. I am satisfied that the mother's breach of the father's guardianship rights and the Court's decision was sufficiently serious to warrant a sanction for contempt. This is not the first time that she has ignored the rights of the father as a guardian of their children as the Court found in its decision of September 2017.⁶

[39] I am also concerned that the mother completed [Connie]'s enrolment at [school 2] without disclosing any details of the father, or the fact that he is a guardian of [Connie]. I do not know what enquiries the school made to find out whether [Connie]'s father was a guardian. His consent was required before they accepted [Connie] as a student. Most children have a father and a mother. Most fathers and mothers are guardians of their children. If the school simply stood back and made no enquiries about [Connie]'s father, or whether he consented to her attending [school 2], this was unsatisfactory and the school was possibly complicit in the breach which has occurred.

⁶ See [11] above.

Summary of Findings

[40] In summary I find that:

- (a) the mother is in contempt of Court.
- (b) She is fined \$400 and Court costs of \$130. Both are to be paid at \$50 a week commencing this Friday.
- (c) A copy of this decision is to be provided to [school 2] by lawyer for the child. [School 2] is requested to revise its policies concerning enrolments so that breaches of this kind do not happen in future.
- (d) Lawyer for child is to explain this decision to the children. They are to know that ultimately it is not their father who has held their mother responsible for disrespecting his rights. It is the Court who has held the mother responsible for contempt of Court.
- (e) The fine and Court costs are not to be paid to the father - they are simply fines and Court costs.

[41] The children need to know that Court orders are to be adhered to. The parties who come to Court in the many proceedings which are heard by this Court expect orders to be adhered to. The general community expects that, and so does this Court.

A M Manuel
Family Court Judge