

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

**IN THE FAMILY COURT
AT HUTT VALLEY**

**I TE KŌTI WHĀNAU
KI TE AWAKAIRANGI**

**FAM-2020-096-000382
FAM-2020-096-000383
[2021] NZFC 705**

IN THE MATTER OF	THE FAMILY VIOLENCE ACT 2018
AND	THE CARE OF CHILDREN ACT 2004
BETWEEN	[SARA GILES] Applicant
AND	[DOMINIC WINKLER] Respondent

Hearing: 26 January 2021

Appearances: Applicant appears in Person
Respondent appears in Person
E Bruce as Lawyer for the Children

Judgment: 26 January 2021

ORAL JUDGMENT OF JUDGE C MONTAGUE

[1] This is an oral decision. I reserve the right to edit it and correct any obvious errors or mistakes or add reasons that I may have omitted to include, but the outcome of the decision that I am about to make will not change.

[2] The applications before the court are as follows:

- (a) An application by [Sara Giles], the mother of the two children, [Eva Winkler], born [date deleted] 2007, and [Audrey Winkler], born [date

deleted] 2010, for a parenting order under the Care of Children Act 2004.

- (b) The children's father is [Dominic Winkler].
- (c) The second application is for an order preventing removal of the children from New Zealand, filed by Ms [Giles], pursuant to s 77 of the Care of Children Act 2004.
- (d) The third application is for a protection order, under the Family Violence Act 2018, filed by Ms [Giles] against Mr [Winkler].

Brief background

[3] The parties separated and Ms [Giles] relocated to New Zealand from South Africa, with the children, in 2019.

[4] Mr [Winkler] remains in South Africa and has taken no steps in these proceedings.

[5] From time to time he has been in contact with lawyer for child and with the court. I am satisfied he has been fully apprised of the need to file any evidence in opposition to the orders sought and has been kept fully informed of all court dates and directions that have been made on this file.

[6] Ms Bruce has been appointed lawyer for the children, [Eva] and [Audrey]. She has filed comprehensive reports throughout and has been in communication with Mr [Winkler] in an attempt to encourage him to put his position before the court so that decisions can be made, having regard to any evidence he wants the court to consider. To date he has not done so and therefore all of the evidence filed by Ms [Giles] is unchallenged.

Dealing first with the application for a parenting order.

[7] The children have been in their mother's care since they came to New Zealand. There is evidence on the file that suggests Mr [Winkler] has consented to that as follows:

- (a) There is a letter, dated 3 December 2019, from [a law firm] in South Africa, recording Mr [Winkler]'s consent to the children travelling to New Zealand with their mother to live here.
- (b) There is a report, from what is referred to as a family advocate, in proceedings in the South African court where Mr [Winkler] has advised that family advocate that he was not opposing the children's residence being New Zealand.
- (c) Mr [Winkler] has, from time to time, confirmed that to be the case with Ms Bruce, as lawyer for the children.
- (d) It is Ms [Giles]'s evidence that there has been the equivalent of a parenting order made in a South African court made on 26 November 2020, which provides her with what she refers to as sole custody. She states she has not yet received a copy of that court order.

[8] As I say, given the complete lack of any evidence from Mr [Winkler] to the contrary, it appears that the parenting order can be made today, however, I must have regard to the views of the children, pursuant to s 6 of the Care of Children Act.

[9] Their views have been very clear. I accord considerable weight to [Eva]'s views, at 13. She cannot be persuaded to have any contact with her father, indirectly or directly. She says that he was violent to her, that he grabbed her by the throat, in an incident in South Africa, leaving bruises, and there is some photographic evidence of that in Ms [Giles]'s affidavit. She also talks about having been picked up from school by her father, drunk, being chased by him, him threatening to hit her and it appears she has witnessed some family violence.

[10] She was not able to be persuaded by her lawyer, despite being given a number of different options, to be positive about contact with her father at all.

[11] [Audrey], at 10, was a little less adamant about not having contact with her father. Although she said that he had hurt her mother and her sister and was worried it would be her next. She too referred to lots of arguments when her father was home, and specifically recalled an incident where there was a fight and her father climbed into [Eva]'s bed. She recalls an incident where her father sat on her mother's head and put his hands round her throat. She said [Eva] sprayed deodorant or perfume in her father's eyes and she had to slam him with a wooden spoon. She described her father as being obsessed with whisky and she thought that drinking made him aggressive.

[12] Both children were clear that they wanted to remain living with their mother and were not particularly positive about contact with their father.

[13] I must have as paramount in my mind, what is in the best interests and welfare of the children, pursuant to s 4 of the Care of Children Act. In considering that, I must have regard to the principles in s 5 and in this case, noting the concerning incidents that the children have both referred to, principle 5(a) as a mandatory consideration because that requires any decisions to ensure the children's safety.

[14] When I take into account what they have said to their lawyer I cannot be certain that the children would be safe in their father's unsupervised care.

[15] I must also have regard to continuity of arrangements and to that extent 5(d) is relevant principle and because the children's father resides in South Africa and no doubt there is extended paternal family there, I do not know, I should also consider the children's right to continued relationships, not just with their parents but with extended family, pursuant to s 5(f) and (e).

[16] For those reasons I will make some provisions for contact but it is not to be unsupervised and it is not to be face-to-face as that is contrary, quite clearly, to what the children have said they would be prepared to have and I am not going to make an order that is simply not going to work for them.

[17] I am also asked to record in the order that the children's habitual residence is New Zealand and I am prepared to do that. As will be apparent later in this judgment, I also intend to make an order that the children not be removed from New Zealand.

[18] There has been a draft parenting order annexed to the affidavit filed by Ms [Giles] and, with some amendment, I am satisfied that it is in the best interests of the children that I make that order.

[19] Lawyer for child submits that she also supports the order as sought, with the amendments I am about to make.

[20] She submits that it is in the best interests of the children that a final parenting order be made today to provide the children with the security they seek and the assurance that they will not be forced to have physical contact with their father, which they are opposed to. She submits that both children suffer from ongoing anxiety when faced with the prospect of having to have contact with their father against their wishes.

[21] Against that background and in accordance with ss 4, 5, and 6 of the Act, I make the following final parenting order.

- (a) The children shall be in the day-to-day care of [Sara Giles].
- (b) The children shall have indirect contact (by telephone and electronically) with the respondent, as agreed between the parties.

Conditions:

- (c) The children's habitual place of residence shall be in New Zealand.
- (d) The respondent is not to discuss any adult issues with the children.
- (e) The respondent, if travelling to New Zealand, is to provide the applicant with at least one month's notice of his intention to do so.

Order Preventing Removal

[22] The second application, under the Care of Children Act, is pursuant to s 77 to for an order preventing removal of the children from New Zealand. I must be satisfied that there is a threat of removal which will defeat Ms [Giles]'s day-to-day care of the children.

[23] She has given evidence that the threats have been reasonably consistent. Lawyer for child confirms that there seems to be a pattern of threats made by Mr [Winkler] to interfere with the children's security of residence and then, to the contrary, confirmation from him that the children can remain in New Zealand.

[24] She submits there have also been, to her knowledge, text messages to [Audrey] directly from Mr [Winkler] threatening to remove her.

[25] She submits that it is in the children's interests to know that they will not be removed and they will remain in the day-to-day care of their mother.

[26] The children require certainty and security. Ms [Giles] requires an order that provides her with the ability to continue providing the children with day-to-day care without the threat of Mr [Winkler] removing them from New Zealand.

[27] I am satisfied, on the evidence, that there have been threats made by Mr [Winkler] to remove the children and defeat Ms [Giles]'s day to day care of them and that it is in the children's best interests for an order providing them with security of residence to be made.

[28] I see as an added benefit, although not the test, the Order will ensure the children remain in New Zealand, Mr [Winkler] knows where they are and they cannot be removed from this jurisdiction.

[29] Against that background:

- (a) I make an order preventing the children's removal from New Zealand.

Finally, I deal with the family violence application.

[31] Ms [Giles] applied for a protection order against Mr [Winkler] based on the evidence that there was psychological, physical and sexual abuse during their relationship.

[32] She goes into considerable detail in her most recent affidavit as to the level of abuse at paragraph 5.3 under the sub-headings include physical abuse, sexual abuse, psychological abuse, intimidation, harassment, damaged property, threats of physical abuse, sexual abuse or psychological abuse and financial or economic abuse, setting out, under each sub-heading at least three or four instances of the abuse that she has suffered.

[33] The children have also referred to violence they have either suffered or witnessed.

[34] I am satisfied that violence has occurred during the relationship and of course the parties were clearly in a domestic relationship.

[35] I have heard from lawyer for child on whether or not a protection order is necessary. She submits two important points. One, her clients consider the protection order is necessary. It will enable them to access a safety programme and allay, to some extent, their anxiety about their father threatening to or hurting them.

[36] The second point is that the police considered, as recorded in the case summary report dated 9 February 2020, that Mr [Winkler] was using the police to harass Ms [Giles] in New Zealand, with continued complaints and requests for welfare checks. That provides, in her submission, some relatively independent evidence of ongoing harassment and a pattern of behaviour which supports the need for a protection order.

[37] Mr [Winkler] has not provided any countervailing factors as to why a protection order is not necessary and, given my finding that violence has occurred in the relationship, as set out in Ms [Giles]'s evidence, unchallenged by Mr [Winkler], I

find that a protection order is necessary for her ongoing protection and that of the children.

[38] Ordinarily Mr [Winkler] would be required to attend an anger management programme, however, that is not feasible in this case. He resides in South Africa and the programme providers are in New Zealand. In accordance with s 188(2), I decline to make a direction as whilst there may be good reason to make the direction, I cannot see how it could be complied with.

[40] As is apparent from the evidence, the children and Ms [Giles]'s application for residency in New Zealand is a matter yet to be determined. I extend Ms Bruce's appointment to remain as lawyer for the children in the event that any matters arise from the orders I have made today that require further clarification in respect of the children's residency applications.

[41] Leave is reserved to Ms Bruce to file a memorandum if that is the case, for referral to me in chambers. I extend her appointment for a further three months accordingly.

Judge C Montague
Family Court Judge

Date of authentication: 23/02/2021

In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.