

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

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**IN THE FAMILY COURT  
AT AUCKLAND**

**I TE KŌTI WHĀNAU  
KI TĀMAKI MAKĀURAU**

**FAM-2018-004-001203  
[2020] NZFC 7686**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[GINA LEI] Applicant
AND	[JOE LEI] Respondent

Hearing: 1 September 2020

Appearances: C O'Donnell for the Applicant  
M Headifen for the Respondent  
L Gray as Lawyer for the Children

Judgment: 18 September 2020

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**RESERVED JUDGMENT OF JUDGE D A BURNS**

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[1] This case concerns the lives of two children: [Sara Lei] born [date deleted] 2012 (about to turn 8) and [Denise Lei] born [date deleted] 2015 (5½ years of age).

[2] In late December 2018 mother applied without notice for a parenting order. She sought to have father's contact supervised on the basis that he represented a safety risk to the children. The without notice application was placed on notice. Subsequently she applied for resolution of a dispute between guardians and sought to relocate the children from [a location in the North Island] to [a location in the South Island].

[3] Father opposed both applications. The parties have filed extensive affidavit evidence together with affidavit evidence from their respective new partners.

### **Issues for determination**

[4] The following issues require the Court's determination:

- (a) whether the children are safe in the care of their father?
- (b) whether the children are allowed to relocate from [the North Island location] to [the South Island location] or not?
- (c) if relocation is granted what contact arrangements should be put in place on the basis that they will be living day to day with their mother in [the South Island location] with their father remaining in [the North Island location]? and
- (d) if the application for relocation is declined what care arrangements should be put in place under s 47 of the Act if they are to remain living in [the North Island location].

### **Background**

[5] Mother and father are both Kiwis. Mother is aged [in her early 40s] and father is aged [in his early 40s]. They met and commenced a relationship [overseas] while they were doing their OE in 2004. In 2005 they shifted to [a city overseas]. Then they went to [another country] [for a one-year period]. They married on [date deleted] 2010. They returned to live in New Zealand in late 2010 and their first child was born

on [date deleted] 2012. They purchased their family home from the father's father (paternal grandfather) in 2012. On [date deleted] 2015 [Denise] was born. The parties separated in March 2018. In March 2018 agreement was reached between the parties that the children would live with the mother and spend two days in the week and one day in the weekend with father. There were no consecutive overnights. Father entered into a relationship in about mid 2018 with [Rosa Hodges]. Similarly in mid-2018 mother entered into a relationship with [Donovan Gardner].

[6] The first area of dispute impacting on the children arose in November 2018 when father requested further time with the children including holiday time and to have consecutive nights in a row including weekend contact.

[7] The parties involved themselves in FDR mediation on 27 November 2018.

[8] During that process father became aware of mother's wish to relocate the children to [the South Island location].

[9] In [late] 2018 mother became engaged and she conceived her third child in [late] 2018.

[10] On 10 December 2018 the FDR process concluded. There was no agreement between the parties on the issue of relocation or care arrangements.

[11] On 19 December 2018 mother made a complaint to the New Zealand Police in relation to alleged possession by father of objectionable material on various devices used by him, namely child pornography. On 20 December 2018 she filed a without notice application raising safety issues. On 21 December 2018 the application was placed on notice. On 4 January 2019 a report of concern was lodged with Oranga Tamariki. On 12 January 2019 mother attended a parenting information programme. On 4 February 2019 mother's application was served on father.

[12] On 12 February 2019 father filed a notice of response and affidavit in support.

[13] On 15 February 2019 father attended a parenting information programme. On 20 May 2019 mother filed her application to relocate the children to [the South Island

location]. [In mid] 2019 mother gives birth to her third child [Connie]. On 29 November 2019 father filed his notice of opposition to the relocation application. On 14 January 2020 the police report that having examined all but one of the devices that nothing of note was located and all of the media appeared to be holiday and family photographs and videos. In September 2018 mother's partner [Donovan Gardner] bought a business in [the North Island location]. In February 2020 Mr [Gardner] placed the business on the market for sale.

[14] As of the date of hearing father lives [in a suburb in the North Island location] together with his new partner [Rosa Hodges]. She has three sons aged [two in their teens and one pre-teenager]. Mother continues to live in [a nearby suburb] in the former family home of the parties. Both children attend [a local Primary School]. Mr [Gardner] travels from [the South Island location] to [the North Island location] in normal times about 1 ½ weeks per month but whilst lockdown has been in place he has spent the majority of his time in [the North Island location]. Mr [Gardner] is a [occupation deleted] operating a practice in [the South Island location]. He also has involvement in a business situated in [another nearby suburb in the North Island location]. The business has been very busy during the Covid-19 period because it makes [a component] which is necessary for face masks. Father continues to work in the [industry deleted]. He says that he and his partner wish to continue residing in [the North Island location] for the foreseeable future. Mother says that if permission is granted to the children to relocate to [the South Island location] she would do that as soon as possible and place the former family home on the market for sale. Otherwise she will continue to reside in [the North Island location] in that home with her three children.

[15] At the time the parties separated [Sara] was aged five and [Denise] aged three. At the date of the hearing they were aged eight and five.

### **Mother's case**

[16] Mother's case in summary is inter alia as follows: Mother said she filed her without notice application as a result of concerns that she had about father's sexual predilections prior to and around that time of separation. This resulted in an admission

by him of having inappropriate online relationships with underaged girls and storing inappropriate images and videos of girls on his iPad, iPhone and iCloud. She said that she asked him to leave the family home on 30 March 2018. Since then she had encouraged contact which increased to the girls being with their father's overnight care on [two non-consecutive nights] each week. In the application she filed without notice she sought to suspend that contact as a result of her concerns that the girls were not safe in his care as the girls displayed anxiety, unsettledness and distress. As at the date of hearing she maintained her concerns about the girls being in the care of their father and in addition to the issue of exposure to pornography she said that father regularly smacked the children. She also raised an issue of one of the girls' nipples being twisted resulting in bruising.

[17] In her application of 20 May 2019 to relocate the girls to [the South Island location] she summarised her reasons for doing so as follows:

- (a) That she was in a relationship with [Donovan Gardner] and had been since [mid] 2018. They were planning to get married in 2020 and their first child together [Connie] was born in [mid] 2019.
- (b) That [Donovan] lives in [the South Island location]. He has his own [business practice] in [the South Island location] and he has his own home in [a suburb in the South Island location] and is able to support the applicant and the girls.
- (c) That she has strong family support in [the South Island location];
- (d) That she remains committed to prioritising the girls' relationships with their father and she was open to in continued contact with father in [the North Island location] and if possible, in [the South Island location].
- (e) In December 2018 the police executed a search warrant and removed a number of devices from father's home. There have also been reports of concern lodged with Oranga Tamariki which resulted in an investigation by social workers.
- (f) Mother said in addition to the benefit the children will get of having a stable home in [the South Island location], access to good schools and regular contact with her partner's family, they will also be able to have contact with her mother who lives in [another South Island location]. She also says in addition they will be economically better off because the cost of housing is much cheaper in [the South Island location]. She further says that the girls in her view will be able to maintain a good relationship with their father by having regular Skype calls and coming to [the North Island location] for a week of each term holidays

and 10 days at Christmas. That he will be able to come down to [the South Island location] provided he gives her adequate notice.

- (g) She says that she will be happier in [the South Island location] because she will be able to be with her partner. That the children will be in a family situation and she says that the girls will not suffer any detriment with their relationship with their father she will continue to promote and facilitate that.
- (h) She does not accept that there is any contradiction in her position with saying that they can have bulk contact with their father in [the North Island location] if they can relocate to [the South Island location] as opposed to her application to the Court for him to have supervised contact based on safety concerns. She says that she has had safety concerns for some time which are evidenced by her complaint to the police, the complaints to Oranga Tamariki and the applications made urgently to Court.
- (i) She says that if the relocation application is declined she would like to shift the children to be nearer her [sibling] in [a suburb in the North Island location] (that issue was not formerly raised before me). She says that if the Court declines her relocation application she will be bitterly disappointed but she will not go to [the South Island location] in any event. She would stay in [the North Island location] but will be upset with the outcome.

### **Father's case**

[18] Father's case in summary is inter alia as follows:

- (a) He opposes the relocation. He says he is a loving caring father and the girls love being with him. He says he lives in a happy household with his new partner and her three sons. That the girls fit in with the family and they have a lot of fun and happiness when in his care.
- (b) He seeks for the children to remain living in [the North Island location] and continue at their current school. He seeks a shared-care on a 5:5:2:2 basis. He says that he is a committed father. That he works four days a week and has a degree of flexibility with his work hours so that he can fit in with the needs of the children.
- (c) He says that he is not a safety risk to the children. He acknowledges that he has used adult pornography and that he had what is "like an addiction" and he has sought professional assistance to deal with. He

says that he has not accessed adult pornography since October 2019. He denies ever involving himself with child pornography or any objectionable material from access on the internet.

- (d) He says that the children have never been at risk with any of his activities with respect to pornography and they will never be at any risk in the future.
- (e) He says that he has never smacked the girls and never would. That he has not in any way twisted [Denise]'s nipple. He considers the allegations are made as a result of influence by the girls' mother. He considers that mother has been undermining his relationship with the girls and that the situation is on the spectrum towards alienation. He says the girls are safe and very well in his care. That he cooperated with respect to the investigation by Oranga Tamariki which has found no care and protection concerns of the girls whilst in his care. That he cooperated in full with the police investigation which also concluded that he had no objectionable material on the devices. He does acknowledge that one or two of his devices were not seized by the police but nevertheless fully denies any accessing of any illegal material.
- (f) He points to the observations of the girls by social workers in his presence showing that they are spontaneous and joyful in his presence and do not show signs of anxiety. He says that is the true picture and reality of life with the girls in his home and the picture portrayed by mother is inaccurate.
- (g) He says the girls raise issues with him of their mother saying negative things about him.

[19] The logical sequence of dealing with the issues in this case is to determine the safety issue first under s 5(a), then the issue of relocation and then the appropriate parenting arrangements depending on the relocation decision. It follows that if the

Court determines that the children were not safe in father's care that his contact would have to be either supervised or limited. It is likely therefore that there will be an impact on his parenting time. It is likely that the relocation case would be more compelling. Conversely if the Court finds that the children are safe in his care it improves or enhances his opposition to relocation.

### **Section 5(a) safety enquiry**

[20] There are three areas of allegations raised by mother which trigger the need for a s 5(a) safety enquiry. They are namely:

- (a) The issue of pornography. Mother first filed an application on a without notice basis for a parenting order in relation to both girls who were then aged six and three respectively. She said she had concerns about father's sexual predilections during that time resulting in an admission by him to having inappropriate online relationships with underaged girls and storing inappropriate images and videos of girls on his iPad, iPhone and iCloud. She said she asked him to leave the family home on 30 March 2018 as a result of her discovering images on one device. She encouraged contact subsequently which increased the girls being in their father's overnight care on [two non-consecutive nights] each week. The application she filed sought to suspend that contact as a result of her concerns that the girls were in fact not safe in his care and as a result the girls displayed anxiety, unsettledness and distress. She does not allege that he has exposed the girls to inappropriate pornography. She does not allege that they have actually come to any risk or harm. She invites the Courts as a result of her concerns to draw an inference that there is a probability that the girls will be at risk because of his addiction.
- (b) The second issue is that she alleges that both girls have been smacked by their father. She also made a complaint to Oranga Tamariki and she reported her concerns to the police. The concerns were summarised in the first report of concerns received by Oranga Tamariki dated 6 August



2019<sup>1</sup> whereby it was said that mother had been at the day care centre with [Sara]. When she called [Sara] to her that father pushed [Sara] onto a nearby couch to prevent [Denise] from going to her mother. In addition she said there were numerous instances involving physical abuse and neglectful behaviour during 2019. That photographs recorded showed injuries to the children: bruising and flea bites. She said there were several instances where [Denise] had a bruise near her nipple which she stated was caused by her father, instances where father had been present in the bathroom when the two girls were bathing, making the two girls get changed in front of father's partner and her male children as well as sending [Sara] home in a dress that was extremely short. Therefore the issue for the Court is whether father or members of his household present a risk to the girls of physical assault and inappropriate exposure to pornography.

#### **Judgment – section 5(a)**

[21] I find on the balance of probabilities that the allegations of physical assault by father by way of smacking and inappropriate twisting or hurting [Denise]'s nipple to be not proven. I find in addition that father does not present an undue risk to his two daughters as a result of his addiction to adult pornography. I make this finding in the knowledge that later in this judgment I would be applying appropriate conditions to the parenting orders which will address any residual risk arising out of the addiction. I am satisfied father is protective of his girls and whilst there are issues of concern raised I am not prepared to draw an inference from the evidence before the Court that father presents an ongoing risk to the girls provided conditions are observed. I also find that he has not in the past placed them in a situation of risk as a result of the pornography. I find that father does have an addiction to adult pornography. I find that it is inappropriate but not a breach of the law. I am satisfied that he does not have paedophilic tendencies which place his daughters at risk. I make those findings for the following reasons:

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<sup>1</sup> Page 36, CYRUS notes.

- (a) There is a contradiction in mother's position. On the one hand she raises issues but then accepts that if the children are allowed to relocate to [the South Island location] they can spend bulk time with their father over the holiday periods unsupervised. I consider that she has raised the issues not because there is a genuine concern that her daughters are at risk but as part and parcel of her case for relocation and seeks to enhance it by raising these issues.
- (b) I consider that the allegations and the timing of them are of concern. There was a delay between separation and the issues were being raised by mother relating to pornography. She did not raise or file her application until late December, some eight or nine months after separation following father's refusal to agree to the children relocating to [the South Island location]. In that eight to nine-month period the girls with agreement from mother had overnight contact with their father. I could not help but reach the conclusion that the allegations were linked to the relocation issue rather than genuine issues of concern. I also observed that there was an escalating pattern of allegations of him smacking in mid-2019 well after the original complaint lodged with the police in December 2018. The complaint by Mr [Gardner] on 4 January 2019 with Oranga Tamariki raising the issues of risk.<sup>2</sup>
- (c) There is a contradiction in what the children say. They appear to say one thing to their mother and Mr [Gardner] and completely the contrary to the social worker involved and to a more limited extent to their teachers. Mother strongly believes and so does Mr [Gardner] that what they have been told by the two girls is truthful. They believe that what they have said to the social worker in her interview is incorrect either because the social worker did not carry out proper investigation or there were other inadequacies in the way Oranga Tamariki undertook this task. Mother believes her daughters are truthful but it is clear to the

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<sup>2</sup> Page 4, bundle of documents Oranga Tamariki.

Court that there is a contradiction between what the girls said to the social worker and Ms Gray as Lawyer for Children and what they had purported to have said to her. As an experienced Family Court Judge and having acted for children for 27 years prior to my appointment I have frequently come across situations where children say one thing to one parent and completely contrary to the other parent or to other professionals involved. This raises the question of why that would be the case. In a relatively recent case a senior psychologist had to deal with the same issue. She explained why children particularly younger ones do say these contradictory things. She said as follows:

16. Underlying mother's position is a common misperception that when children make statements (alluding to abuse) that it is either 'the truth' or 'a lie'. A key problem with this approach is that it is somewhat over simplistic. What is often less understood is that children can be vulnerable to making false reports of abuse/inappropriate behaviour by a parent. Rather than necessarily deliberately and maliciously intending to deceive (as some teenagers can) emotionally younger (or more vulnerable) children can fantasise, furnish false information, furnish misleading information, misperceive events, try to please adults (by telling them what they want to hear), respond to leading questions and respond to rewards and praise.
17. In light of this, children should not be automatically believed, nor should they be automatically disbelieved. Instead, consideration needs to be given to a number of factors, to help one determine the relative confidence one can have in the accuracy or otherwise of the information being provided by a child (and the associated meaning one ascribes to their behaviour).

I agree. I have to assess all the evidence. I will consider the pornography issue first.

- (d) With respect to the pornography issue mother believes that father was in possession of objectionable images. I remind myself that Family Court is a Court of law, not a Court of morality. The issue of whether a crime has been committed arising out of a possession of objectionable

images is governed by s 131A of the Films Videos and Publications Classification Act 1993 (FVPCA). Father admits that he has “like an addiction to adult pornography” but he says he has never had possession of child pornography. Section 131A of the FVPCA says as follows:

**131A Offences relating to possession of objectionable publications and involving knowledge**

- (1) Every person commits an offence who does any act that constitutes an offence against section 131(1), knowing or having reasonable cause to believe that the publication is objectionable.
- (2) Every person who commits an offence against subsection (1) is liable [on conviction],—
  - (a) in the case of an individual, to imprisonment for a term not exceeding [10 years] or to a fine not exceeding \$50,000:
  - (b) in the case of a body corporate, to a fine not exceeding \$100,000.

[22] For an offence to occur father would have to have possession of objectionable material i.e. child pornography. There would have to be no lawful excuse (not argued in this case) and that mother would have reasonable cause to believe that publication was objectionable.

[23] In this case I have no evidence before me that any images on the devices held by father meet the category of objectionable as defined by the FVPCA. The question of whether any images are objectionable is a question of judgment. The Court has not been provided with any images on which to exercise that judgment. The police conducted an investigation and executed search warrants to seize various devices owned by the father. Father acknowledges that two of those devices were not seized. He does not know why. The Court can only work on the evidence that is before it. I cannot guess or speculate. The police say that they did not find any objectionable images that would give rise to any charges. Mr [Gardner] was not in a position to give any independent evidence of seeing images because the mother and father had

separated before mother resumed her relationship with Mr [Gardner]. Mother says she saw images but did not retain copies or record of them.

[24] Mother says that she saw images of what she considers to be a young girl. That it is clear that she is not an expert or has no experience in assessing whether that would infringe the Act or not. It was an issue between the parties and she had a very jaundiced view about father's predilections. I do not know whether objectively I can find that her evidence would meet the definition of objectionable material. I have had to preside over a number of cases in the criminal jurisdiction relating to charges under the FVPCA. In some cases the classification is accepted. In other cases it has to be determined by the Court. Often expert evidence is given because the victims in child pornography are often overseas and cannot be located and there is no way to accurately ascertain age. There are a number of ways that experts and the Court can reach the conclusion that the material is objectionable. I have not been provided with any evidence on which to undertake that exercise in this case. The evidence falls well short of what I would expect in order to make a judgment that father has had possession and control of objectional material. Mother says father made an admission. This is denied. I cannot resolve this conflict on the balance of probabilities. However, I can safely find that he has had possession and control of adult pornography. This is admitted. It is not illegal under the FVPCA but with being a father of two girls I am satisfied that it is distasteful and inappropriate. Father will be wise to reflect on this behaviour. His evidence is that he has not had access to adult pornography since October 2019. He says he will continue to receive psychological counselling from an appropriate expert to deal with any addiction behaviour and possible relapse. That must continue. I find that he has not done anything illegal but this addiction could be a problem in him not giving attention to the girls or distracting him. It also does not provide a good message to them. I am satisfied however with appropriate conditions any residual risk can be managed.

[25] I am satisfied at this stage that he does not have paedophilic tendencies or issues relating to young girls. He does have issues relating to adult pornography and that is why I have made conditions on the parenting orders referred to later in this judgment. Mother consents to unsupervised contact which has been in place for a long time. This is reinforced by the fact that the police have not laid any charges.

[26] It is likely in my view that if there was possession or access to child pornography it would have come up on the devices seized and also from analysis of the Google search. I am satisfied that it is likely that the police would have undertaken that analysis and probably for that reason did not see they needed to seize the other devices. Mother is critical of the investigation but the officer-in-charge has not been called to give evidence.

[27] I now move to consider the smacking and nipple assault issue. I cannot make findings on the balance of probabilities that this has occurred for the following reasons:

- (a) There has been a full investigation by Oranga Tamariki which I will expand shortly. Oranga Tamariki has no care and protection concerns.
- (b) There are contradictory statements by the girls.
- (c) The observations made by the social workers of how the girls are in the presence of their father does not indicate any anxiety or fear being held by them.
- (d) There is a conflictual situation between the parents particularly over the issue of relocation. Mother holds a very negative view about father. He similarly holds a negative view about her because of what he perceives to be inappropriate influence. The girls are caught up in the middle and their views cannot be given any weight in the circumstances.
- (e) It is clear on the facts before me that the girls are saying one thing to their mother and Mr [Gardner] and another thing to their father, social workers and Ms Gray.
- (f) The timing of the allegations and the escalating nature of them gives concern.
- (g) The contradictory behaviour of mother allowing unsupervised contact and proposing bulk time in the event of relocation being granted.

[28] I now turn to deal in more detail with the Oranga Tamariki investigation. By way of background mother is in a dilemma. On the one hand she has concerns about the girls' safety. On the other she wants to take them to [the South Island location]. The only way that they can maintain a relationship with their father if they went to [the South Island location] is to spend bulk time with him during holidays. This therefore raises an inherent contradiction in her position. She has been advised that the law says that the girls' relationship with their father needs to be enhanced and preserved. The law also says that the contact has to be safe. The girls are aware of their mother's position. It is clear she has involved them in adult issues. Mr [Gardner] has strong views about the situation. This is evidenced by his two complaints to Oranga Tamariki without mother's knowledge. It was also evident from his evidence that he holds strong feelings. I am satisfied that father has not smacked the girls or twisted and bruised a nipple. I find this is a case where the girls have wanted to please their mother and have said things to her that she wanted to hear. She wants very strongly to go to [the South Island location]. The girls are very aware about this. They have told their father about why they can say contradictory things about this. They are aware of the large amount at stake between their parents. Father denies smacking the girls. I accept his evidence on this issue. Social workers have been able to observe the girls with their father. They have undertaken a diagnostic interview. On pages 47 and 48 of the OT bundle of documents there was acceptance by mother that the girls should not undertake an EVI. At page 48 it says as follows:

[Gina] does not have any concerns for the safety of her children while in the care of their father. [Gina] is trying to negotiate with [Joe]'s lawyers at the moment so that she and the girls can move down to [the South Island location] soon. [Gina] was advised by her lawyer that they did not need to follow police direction for [Joe] not to have contact with the girls as there is no court order dictating this. [Gina] just wants to be able to take the children down to [the South Island location] with her – this is where [Gina]'s partner is from, and they are about to have a baby and she would like to settle down there as soon as possible. I asked [Gina] whether she would consent to EVI and she said under normal circumstances she might, but she doesn't want to risk [Joe] saying no to them moving to [the South Island location] out of spite. SW observed [Gina] has a very poor opinion of [Joe], which was demonstrated through the way she spoke about him. Re: flea bites and bruising, [Gina] stated she took [Denise] to several doctors to get them checked out and [Denise] was given antibiotics.

[29] The social workers' observations of the girls being with their father and showing no fear and showing lots of love and affection towards him appeared on

page 64 of the NOE. It page 67 the social worker observed that when she spoke to mother she seemed more concerned about allowing contact between the children and their father to continue so as not to jeopardise her attempts to move with the children to [the South Island location]. That she repeated at the meeting on 9 August 2019 that she had no concerns for the safety or the wellbeing of the children in their father's care despite the allegations being made. The social worker records that she had spoken to the children but they both said that they did not like to stay with their father but were unable to give reasons why. She records the interview about touching and nothing inappropriate arose. At page 71 of the NOE the social workers observed and concluded that the girls were both attached to their father and that he was able to demonstrate warmth and affection in the relationship and that on observation the girls felt safe and comfortable when with him. That it was hard to differentiate [Denise]'s thoughts and feelings from that of [Sara] because [Denise] often parroted what [Sara]'s thoughts and feelings were. At page 73 there is a record by the social workers of the apparent bitterness between the parties. At page 102 is a record of the second report of concern raised by Mr [Gardner] (without apparent knowledge by mother). The first report of concern had been raised on 6 August 2019 (page 36 NOE). The second being on 25 September 2019. At page 107 which is a summary of the report of concern it clearly shows strongly-held feelings by Mr [Gardner] and the link made to the relocation issue.

[30] At page 122 is the third report of concern raised on 27 February 2020. At page 137 is a record of the outcome of the police referral and the record of the numerous complaints that had been made. They are summarised at page 138. At page 157 is a record of the interview with [Sara] and at page 158 the interview with [Denise]. No disclosures were made or recorded apart from [Denise] saying that she was smacked but the allegation was non-specific. The interview clearly establishes exposure of the girls to their mother's views which they were well aware of. At page 195 records a meeting of social workers with father and [Rosa] and at page 196 is the resolution requested. At page 212 social workers observe a pattern arising. At page 240 is the finding that there are no care and protection concerns and at page 242 is the final care assessment Tuituia report with the overall conclusion which is set out at page 243. It records that the girls have a very positive relationship with their father. At page 245 the school observations are set out and also records mother's approach



and philosophy towards bringing the children up which gives significant weight to their views but has the risk of inappropriately involving them in the conflict. The social workers concluded at page 251 that they may have to take a different pathway if further allegations are made. The social workers clearly reached the conclusion that the girls were caught up in the middle of adult conflict and little or no weight could be given to their views. This was placing them at risk and that there may have to be the holding of a FGC to investigate further being caught up in the adult conflict.

[31] I was able to read in full the comprehensive file which had arisen at Oranga Tamariki and I conclude that there was a thorough investigation of the allegations by competent social workers which resulted in a conclusion that there were no care and protection concerns. I do not accept the allegation made by mother that the investigation was not properly conducted and can accept the conclusions reached by the social workers which I have outlined above. Therefore overall I conclude that there is no undue risk of the girls being smacked or assaulted in the care of their father. I do consider there is a residual risk with respect to the pornography issue but conclude that it can be managed by appropriate conditions attached to parenting orders. On that basis therefore I do not consider s 5(a) is triggered to warrant father's care of the children being supervised. I conclude that it can continue unsupervised as it has been since March 2018.

## **Relocation**

[32] I now move on to the relocation issue.

### **Should the girls be able to relocate to [the South Island location]?**

[33] Mr Headifen and Ms O'Donnell have a large consensus between them as to what the law is that applies to relocation as summarised in Ms O'Donnell's closing submissions paragraphs 24-28 inclusive. I set that out as follows:

24. It is accepted that the leading decisions for relocation cases are:
  - *Kacem v Bashier* [2010] NZSC 112 [2011] 2 NZLR 1;
  - *D v S* [2002] NZFLR 11; and

- *Stadniczenko v Stadniczenko* [1995] NZFLR 493.

25. The continuing relationship with both parents' consideration along, with the other considerations, must be taken account of. That consideration however cannot be raised to the level of an overriding consideration. The Act states that the continual relationship with both parents is one of the factors that the Court should consider. It is submitted however that the child's best interests is still the paramount consideration. In *Stadniczenko* the Court said the preferable approach is to "weigh and balance" factors that are relevant to the particular circumstances of the case at hand "without any rigid pre-conceived notions as to what weight each factor should have". (At page 500).
26. The same emphasis was put in *D v S* by the Court of Appeal where the emphasis was on all aspects of welfare to be taken into account, "there is no room for a priori assumptions".
27. In a decision of the High Court at Palmerston North *S v O* [2006] NZFLR No. 1, a decision of Wilde J, the Court referred specifically to the decisions of *Stadniczenko v Stadniczenko* and *D v S*, as well as numerous other cases and articles and from those authorities derived various "key legal principles" including:

[24] For guidance as to the approach to be taken in dealing specifically with the relocation issue, the Judge referred to the Court of Appeal's approach in *Stadniczenko v Stadniczenko* [1995] NZFLR 493 and *D v S* [2002] NZFLR 116, as well as numerous other cases and articles. From these authorities, he derived various "key legal principles", including that:

- (1) The welfare of the child is the overriding consideration.
- (2) The Court must identify and weigh the factors relevant to welfare on a case-by-case basis.
- (3) There should be no preconceived or presumptive notion regarding the weight (or priority) to be placed on any one factor.
- (4) A global, child-centred approach to welfare is appropriate.
- (5) There is no onus on either parent, but a custodial parent seeking relocation must satisfy the Court that their wish to relocate does not derive from a desire to deny the other parent access.
- (6) The UN Convention on the Rights of the Child provides for a child's right of continued access to both parents, and states that the law should presume that such access is in the child's best interests.
- (7) The reasonableness of the relocating parent's wish to move must be assessed in relation to the disadvantage

for the children of reduced contact with the other parent.

[25] The Judge then identified the following factors as potentially relevant in most cases, emphasizing that there could be no order of priority:

- (1) The relocating parent's capacity to value the input of the other parent, and to facilitate and encourage access by the other parent.
- (2) The non-moving parent's capacity to demonstrate continued interest in the children after relocation.
- (3) The extent and focus of conflict between the parents, either underlying or resulting from a decision to relocate.
- (4) The practical consequences of relocation (transport, costs, accommodation) and of declining relocation (financial or employment consequences for the relocating parent).
- (5) The distance between the two parents' homes.
- (6) The impact of granting (or declining) relocation on the children's family and social support networks.
- (7) Cultural, social and spiritual considerations.
- (8) The children's previous living arrangements (i.e. number of previous moves) and the suggested new living arrangements (i.e. whether the children have lived there before).
- (9) The merit and reasonableness of the parent's wish to relocate.
- (10) The extent to which the children's relationship with the non-moving parent will be affected.
- (11) The wishes and needs of the child or children.
- (12) The impact of granting or declining relocation on the children.

28. Reference is also made to the decision of *Brown v Argyll* [2006] NZFLR 705. The principles deduced from Priestley J in that decision include the following:

- a) In relation to relocation the welfare and best interest of the child must be the first and paramount consideration;
- b) The Court must assess the particular child and his/her specific circumstances – it is an individualized assessment;

- c) The Court must undertake a multi-faceted analysis to arrive at a conclusion that will meet the best interests and welfare of each child without giving undue weight to any one factor (no presumption);
- d) There is no legal onus on either parent.

[34] Similar authorities were referred to me by Mr Headifen in his opening submissions.

[35] Ms O'Donnell has referred me to a number of cases in her closing submissions which I have considered but every relocation case is very fact specific and I have to give full consideration to these two girls in their particular circumstances. I must now move to consider s 5 principles in the Care of Children Act. I have already dealt with s 5(a) above so I now move to s 5(b).

#### Section 5(b)

[36] There is no dispute that the parents are primarily responsible for the upbringing of the two girls. This is a principle that does not inform the relocation decision.

#### Section 5(c)

[37] The parents have cooperated in making the care arrangements occur. There is no cooperation between the parents on guardianship issues. There is no trust between them. This is the major issue which impacts on the ability of the Court to sanction the children relocating to [the South Island location]. I find that if the children shifted to [the South Island location] that within a relatively short time they will lose their relationship with their father. The reasons I make that finding is as follows:

- (a) there is no trust between the parties;
- (b) mother has a very negative jaundiced view about father and considers the children are not safe in his care. She has limited contact to not allow consecutive nights. She has provided warnings to the girls about their father seeing them in the bathroom. They have received a message from her that he is not safe;

(c) the attitude expressed by Mr [Gardner] is of concern. It was clear when he was giving evidence that he harboured considerable anger about the situation. The stakes are very high for him. He and the mother have had a child and he said that he wanted to have a second child. He said in evidence that this could not occur unless they shifted to [the South Island location] (he did not express the reason). He is clearly established in [the South Island location] together with members of his family. He strongly wants the children to relocate to [the South Island location] so that he can continue his way of life with all three children. It is evident to me that he will feel very disappointed if the Court does not sanction relocation. He has already lodged two complaints with Oranga Tamariki without reference to mother. He accepts without reservation what the girls have told him and does not have the insight to understand that they may be saying to him what they think he wants to hear. I am concerned that on the girls arriving in [the South Island location] that there will be further complaints to Oranga Tamariki and possibly to the police. There is likely to be applications made to the Court to suspend or vary contact. I worry that there will be ongoing litigation in relation to the girls which will become costly and expensive and put the girls under pressure;

(d) I find that mother is a restrictive gatekeeper for the children in promoting their relationship with their father. She was asked a question in cross-examination that in the event that relocation was allowed and father came down to [the South Island location] during the term time to exercise contact what would her attitude be. She said that provided that there was plenty of notice and it did not clash with other events that their girls were committed to she would agree. It was evident in her answer in my view that she was not going to facilitate easily and promote the additional contact during term time even if father went to the cost and expense of travelling down to [the South Island location] to see the girls. Because of her underlying suspicion and distrust I think her attitude will harden if they get to [the South Island location] and she will not facilitate ongoing contact in an easy way;

- (e) I predict that both parties will incur considerable costs and expense from further litigation between them. If the Court allowed relocation it is likely that the applications will have to be dealt with by the [the South Island location] Family Court. It will be less costly for mother but more costly for father. This is likely to exacerbate the frustration being experienced by both parents and further escalate the conflict;
  
- (f) the children have already been influenced in their views and have been caught in the middle. If they shift to [the South Island location] and with the escalating conflict they will be even further caught in the middle. They are likely to align themselves with their mother and express views contrary to promoting the relationship with their father. Father will feel powerless to correct the situation. He may be tempted to try and influence them in reverse. This will make the situation intolerable for the children. They are likely to vote with their feet and align themselves with one parent. They will take the easy option of not having any contact on a longer-term basis with the other parent (probably father). There is a potential that one of them as they get older may do the reverse and align herself with father which could jeopardise her ongoing relationship with her mother.

[38] For those reasons I am satisfied that the relationship of the girls with their father will not be fostered, maintained and preserved if they go to [the South Island location]. I predict that there will be no consultation and cooperation between the parents.

#### Section 5(d)

[39] I have concerns that the children's continuity of relationship will be affected for the reasons specified above. I predict that they will cease to have continuity of their relationship with their father if allowed to relocate for the reasons already stated.

#### Section 5(e)

[40] The relationships the children have with extended family is important. Father's family is predominantly situated in [the North Island location]. Mother's father died in [month deleted] 2020. It was a proposal for him to shift down and be in the same house as mother. She says that her mother lives in [another South Island location] which is about five hours drive from [the first South Island location]. I accept that it will be easier for her to see her mother but it will still involve some travelling. Mother also has her [sibling] living [another suburb of the North Island location] and it follows that if the children were to relocate she will have more difficulty seeing her [sibling] but easier ability to see her mother or the reverse will apply if relocation is not allowed. She did express a view in evidence that she would like to relocate to the [same suburb as her sibling] on the sale of the family home if relocation was not allowed. That is a whole separate issue because it would involve changing the girls' schools and raises further guardianship issues between the parents. There was no application before me to allow the children to relocate to [the suburb of the North Island location] and so that will have to be the subject of fresh applications and determination by the Court in the event that the parents cannot agree on that. I find that this principle does not assist me in making the decision because the outcome is relatively neutral. If they go to [the South Island location] they would lose contact and relationship with a lot of father's family but they would gain that in terms of Mr [Gardner]'s family and maternal grandmother. There are some pluses and minuses with each option. I find that they cancel each other out and this does not assist me in determining this case.

#### Section 5(f)

[41] Mr Headifen in his closing submissions refers to the fact that the girls have Chinese heritage with paternal grandfather being Chinese. That this could be impacted on if they were to shift to [the South Island location]. I have not detected on the evidence that this cultural part of their upbringing has received a significant amount of emphasis from their father. It may become more important to the girls as they get older. It is important that they maintain a relationship with their paternal grandfather but this factor does not outweigh the need to maintain relationships with their maternal family. This factor does not assist me in determining this issue.

## **Other factors**

[42] I now turn to other issues which impact on this decision.

### Reasons for the shift to [the South Island location]

[43] Mother's reasons for the shift to [the South Island location] in my view are entirely genuine and understandable. She has entered into a new relationship and they are the parents of a new child. Mr [Gardner] is resident in [the South Island location] and established there with his [business practice] and property commitments. I fully understand from their perspective why they would want the children to relocate to [the South Island location] and to create a family situation. I accept fully that there was no hidden agenda by mother in wanting to shift to [the South Island location] and whilst there has been parental conflict I do not detect that she is wanting to shift to [the South Island location] in order to get away from that conflict. I think her reasons for wanting to shift are logical and understandable. I find accordingly.

### Mother's functioning

[44] One of the issues in relocation cases that I am always very conscious of is what will happen in the event of relocation being declined and what will happen if it is granted in terms of the primary parent's functioning. It is important for the girls' sake that their mother functions as a parent to her optimum because if there was to be any mental health issues or declining of her general wellbeing and functioning as a result of declining the relocation this is a factor that the Court has to give very careful consideration to. I was able to see and observe mother giving evidence and look at the totality of the evidence presented to the Court. It is clear that mother is in all respects a skilful parent and I am not aware of any mental health issues, addiction issues, general wellbeing and functioning issues on the evidence before me. Mother appears to be competent and skilful apart from involving the children in adult issues. She clearly wants to shift down to [the South Island location] but I consider that it is unlikely that her functioning as a parent will deteriorate if the answer is no. I think she will adjust and move on with her life and continue to bring up her children in much the same way in [the North Island location] as she would in [the South Island location].



I consider that she is pragmatic and she is represented by a experienced Family Court practitioner. She is very familiar with relocation cases. I am certain that had this been a factor Ms O' Donnell would have commissioned a psychologist to provide a report as to the impact on mother's functioning in the event of declining the application. I have no psychological or medical evidence to indicate that mother's wellbeing will decline. I think I can safely make a finding that her functioning will remain at the higher end no matter what the outcome.

#### Economic factors

[45] I accept the evidence given by mother and Mr [Gardner] that they will probably be better off financially in [the South Island location]. Mr [Gardner] says that he is the owner of three properties in [the South Island location]. His practice is there. That cost of housing is much less in [the South Island location] than it is in [the North Island location]. He is already established in a pleasant residence and I think it is likely that the standard of living that mother and the children would enjoy would be enhanced and improve if they were to go to [the South Island location]. On the other hand Mr [Gardner] is involved in a business situated in [a suburb in the North Island location]. He has been working very hard in that business during Covid-19 lockdown. Whilst it is on the market for sale no sale has been achieved as yet. His business commitment causes him to spend time in [the North Island location]. I am satisfied on the evidence provided to the Court that if the children have to remain in [the North Island location] that Mr [Gardner] would be able to rearrange his affairs and they will be either able to acquire or rent a pleasant property in [the North Island location] (in the event of the family home having to be sold) and I do not think the children's material circumstances will be diminished. Whilst I think there will be some more money available in [the South Island location] I do not think that it is that significant that it has an impact on the welfare of the children. Mr [Gardner] is clearly a very competent individual and has the knowledge and ability to organise appropriate loans or rearrange financial affairs so that the children are well housed and provided for.

### Likely parenting arrangements

[46] If relocation is allowed and looking at the proposals each parent has put to the Court it is likely that if they are in [the South Island location] the parenting arrangements in summary will be as follows:

- (a) One visit to [the South Island location] during term time by father.
- (b) Possibly one visit by children to father in [the North Island location] during term time.
- (c) Half of the school-term holidays.
- (d) Two or three weeks over Christmas.

This will therefore be in the range of 40-50 nights per annum, somewhere around 12-15% of the year.

[47] If they remain in [the North Island location] they are likely to continue in a shared-care arrangement with their father during term time and the same arrangement for school holidays and Christmas as would apply if they were in [the South Island location]. Therefore they are likely to spend say five nights per fortnight during each term, which is 100 nights during the year in the four terms plus a week in each of the term holidays being  $3 \times 7 = 21$  days and two to three weeks with father during Christmas holidays. This come out to about 33% of the nights the children would spend with their father and the other two thirds with their mother. All of that is on the assumption that the care arrangements ordered by the Court were adhered to and actually took place. Looking at these scenarios I have to make an assessment as to the likely impact on the children's relationship with their father if the above prediction took place. For the reasons already given I am seriously concerned about the sabotaging of the relationship with their father if they go to [the South Island location] but I am also concerned that the amount of time they will spend with him being only logistically available because of the distance will also damage the relationship and cause a loss of relationship with their father. So I predict therefore that on the amount

of time their relationship will diminish with their father. There may be some consequent improvement in the relationship with the mother but in my view the improvement will be marginal because it is already very strong. There will be some enhanced relationships with Mr [Gardner]'s family and with maternal grandmother but I do not think this will outweigh the loss of relationship with their father.

#### Ability for parents to relocate themselves

[48] An issue arose during the hearing as to whether father has the ability to shift to [the South Island location] in the event that relocation was allowed. He said that he had explored the possibility but it had implications for his relationship with Ms [Hodges]. Her three boys have been schooled in [the North Island location] and she has employment in [the North Island location]. While he accepted it was not impossible and he would have to look at the situation it would cause him difficulties. Similarly, I think the same question was put to Mr [Gardner] and he accepted that there was a possibility that he could spend more time in [the North Island location] as he already has done through the lockdown period but again it would have implications for him because he was established in [the South Island location] and he has regular contact with members of his family. Therefore it is a possibility for both sides but in each case there will be other issues that arise. I consider however that Mr [Gardner] has greater ability to be more flexible than father and his partner do. This has been amply demonstrated by the amount of time that he spent in [the North Island location] during the lockdown periods.

#### **Judgment on the issue of relocation**

[49] In this case I find that relocation should be declined and I find that the likely loss of relationship with their father will cause more harm and have greater impact on the girls than the benefit they will receive by shifting to [the South Island location]. Therefore in their best interests and welfare in my view the relocation application should be dismissed and it is dismissed accordingly. The two principal reasons are that the amount of time they will see their father if they go to [the South Island location] (assuming the orders are adhered to) will not promote and enhance the relationship they have with him which is strong. I also consider that for the reasons

stated there is likely to be further loss of relationship because of the attitude of mother and Mr [Gardner], the ongoing relationship and the likely detriment that will occur because of the strongly-held attitudinal issues. I consider in the long term interests of these girls that they should have a strong relationship with their parents and their respective families and that is more likely to occur if they remain living in [the North Island location] than it is if they go to [the South Island location].

**Care arrangements of the girls on an ongoing basis now that they are living in [the North Island location]**

[50] Father has put a proposal that there be an equal shared-care arrangement on a 5:2:2:5 basis. Mother opposes that. Mother essentially I think supports the status quo continuing of two nights but not consecutive during the week and one night on the weekend. I do not consider a 5:2:2:5 arrangement at this stage will be workable. If it was to be ordered it would heighten mother's anxiety and concern about the girls' exposure to pornography or some inappropriate activity. Whilst I have found that on an objective basis and on the balance of probabilities the children will be safe with their father I also predict that mother will continue to have ongoing subjectively-held feelings on anxiety about that. I think it will take some time for her to be reassured that it is not an ongoing issue. I think that level of anxiety is likely to flow on and impact on to the children. I also consider that the situation of split weekends is going to become unworkable in the near future. That the girls are getting to an age where they need to have alternate weekends with each parent. With a new baby mother is involved in parenting mode all the time and so it does not impact on her so much but it certainly does on father and his family. Also I think the girls are likely to get involved in sport or other Saturday type activities and alternating the weekends will enable both sets of parents to become involved in those activities. What I have got to achieve is promoting and enhancing the relationship the girls have with their father but not so as to undermine and damage their primary relationship with their mother. I also have to take into account their views as expressed by the girls albeit influenced. They have expressed a view that they want to go to [the South Island location]. I consider that view influenced and/or because they are caught in the middle but nevertheless they will experience disappointment when the decision is conveyed to them that they will not be going to [the South Island location]. I consider that an

appropriate balance between the above objectives is a 9:5 arrangement during term time. I order equal split of the term holidays and an arrangement during Christmas so that they spend half of their time with each parent over the Christmas holiday period. The arrangement needs to be predictable and workable. It needs to be a parallel parenting arrangement because there was little cooperation and trust between the parents. The reality is the girls will need to continue living in two separate worlds without much connection between them. For the reasons given in the High Court judgment by Justice Baragwanath of *L v A (No.2)*<sup>3</sup> it is in the best interests of the girls that they continue to have a good time with their father and be in a parallel parenting arrangement even where there is little or no communication between the parents and a level of distrust and conflict between them. I do not think at this stage that either girls can cope with being away from their mother for more than three nights and that is why I have made the orders so that they see their father on a regular basis but the most they are away from her on any one occasion is three nights (apart from holiday time) which is an exception to the general rule during term time.

[51] Accordingly I make the following parenting orders and impose the following conditions on those parenting orders for the reasons already given:

Term time

The children are to be in the care of their father:

- (a) Every second weekend commencing Friday after school at 3pm or such earlier time the school closes until return to school the following Monday morning at 8.30am or whenever school opens (three nights). In the event that the Monday is a statutory holiday father's time will be extended by a further 24 hours until Tuesday morning.
- (b) Each Wednesday father will have the care of the children from pick up at school at 3pm and return to school the following Thursday morning, making a total of five nights per fourteen. The first weekend will occur 14 days after receipt of this judgment and be every second weekend

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<sup>3</sup> 23 FRNZ 602.

during the term time inclusive of the term holidays until the end of Term 4 2020.

- (c) From 2021 onwards father will have the first weekend of Term 1 and every second weekend thereafter including the term holidays until the completion of Term 4.

#### Term holidays

Whichever parent is due to have the care of the children on the alternating weekend basis for the first weekend of the term holidays will have an additional five nights concluding at 5pm on Friday immediately preceding the middle weekend (seven nights). Whichever parent is due to have the middle weekend of the term holidays will have an additional five nights (second week) concluding at 5pm on the Friday immediately preceding the final weekend. In other words the alternating weekend arrangement shall continue through the term holidays with an additional five nights making a total of seven during the term holidays i.e. the term holidays will be split equally between the parents. In the event that a parent has to work that parent will be responsible for organised holiday care or care by other relatives.

#### Christmas Day/Christmas holidays

In even years the children will be in the care of their mother from the end of Term 4 until 3pm Christmas Day. They will then be in the care of their father from 3pm Christmas Day for a period of 10 nights. They will then be in the care of their mother for a further ten nights and the balance of the Christmas holidays shall be split equally between the mother and the father with the proviso that the children will be returned to mother's care 48 hours prior to commencement of school so that she can get them ready to commence school in the new year. They will then go into the care of their father on the first weekend of Term 1 and every second weekend of the year thereafter.

### Odd years

The above arrangement will reverse and alternate from year to year thereafter.

### Special days

In the event that the children are not in the care of their mother on Mother's Day they will be placed by father in the care of mother from 9am Mother's Day and he will forfeit that time. Similarly if the children are not in the care of their father on Father's Day mother will ensure that the children are with him from 9am on Father's Day and returned to school the following Monday morning. Whichever parent has the care of the children on their respective birthdays shall ensure the other parent has at least two hours with the child on their birthdays.

[52] The above parenting orders are made on the following conditions:

- (a) The parents will communicate with respect to issues solely arising out of the needs of the children through my Family Wizard App and shall make arrangements to have it installed on their cellphones as soon as possible after these orders are issued and communicate solely through that App thereafter.
- (b) That whenever changeover occurs outside school both parents are to behave in an adult civilised manner and ensure the children are not exposed to any conflict.
- (c) Neither parent will speak in a negative or derogatory manner about the other parent or any member of their family in the presence of the children and will always speak about the other parent in positive terms.

[53] All changeovers will occur at school unless school is not in session when it will occur at the home of the parent who has got the care so the parent who is about to get the care will come to the other parent's home and pick the children up (when school

