

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

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

**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2017-044-000175
[2021] NZFC 11813**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[SHARON MACKIE] Applicant
AND	[JAMES NICHOLS] Respondent

Hearing: 17 & 18 November 2021

Appearances: Mr Parkinson Wisely for the Applicant
Respondent Self Represented
Ms R Holm as Lawyer for Child

Judgment: 2 December 2021

RESERVED JUDGMENT OF JUDGE K MUIR

[1] [Amanda Mackie-Nichols] is five years old.¹ She is the only child of [James Nichols] and [Sharon Mackie], although she has two brothers, [Zachary] who is 10 years old and is Mr [Nichols]'s son from a former relationship, and [Caleb] who is her mother Ms [Mackie]'s recently born son with her partner [Stuart]. [Zachary] lives week about with Mr [Nichols]. [Caleb] is in Ms [Mackie]'s fulltime care and [Amanda] currently spends most of her time with Ms [Mackie].

[2] [Amanda] is universally described as an engaging, intelligent, empathetic and delightful child who is emotionally and intellectually mature for her age. She is adored by both of her parents. The Court-appointed psychologist Ms Wali has described both of [Amanda]'s parents as “*adequate parents, genuinely committed to providing the best for [Amanda]*”.²

[3] Ms Wali has noted that [Amanda] was active, happy and engaged in both parent's homes. Both parents have agreed that she is caring, confident and progressing well developmentally. However, in the two s 133 reports that Ms Wali has provided to the Court and in her evidence in this hearing, she has maintained the expert opinion that “*the ongoing interparental conflict poses a high risk to [Amanda]*”.³

[4] While [Amanda] needs to be protected from that continuing parental conflict she is otherwise fortunate to have two secure homes with her loving parents. The only additional complicating factor for [Amanda], apart from the interparental conflict, is that her mother lives in [location A] and her father lives in [Auckland], although he now maintains a second home in [location A] and intends to live there on a week about basis to facilitate [Amanda]'s care.

Issues

[5] The principal issues that her parents have been unable to agree on are:

¹ Born [date deleted] 2016.

² Section 133 report by Ms Renuka Wali, 18/3/2019, para 12.1

³ Section 133 report, 18/3/2019, para 12.1.

- (a) The number of days that [Amanda] has in the care of her father. Should there be an increase in his time? What time should she have in his care during school holiday periods?
- (b) How should handovers be managed? Is it necessary to continue to use a supervisor/facilitator?

[6] [Amanda]’s parents have been involved in many Court hearings about her since Ms [Mackie] first applied without notice for parenting and protection orders when [Amanda] was six months old.

[7] Ms [Mackie] had filed some 22 affidavits since March 2017. Mr [Nichols] had filed at least 23 affidavits during the same time. There were two reports under s 133 Care of Children Act (the Act) before the Court.⁴

[8] On 2 October 2019 Judge de Jong delivered a judgment after a three-day hearing.⁵ He made an interim shared care parenting order, under which [Amanda] was to be in Mr [Nichols]’s care from 4.30 pm on Friday until 4.30 pm on Sunday in week one, and from 4.30 pm on Wednesday until 4.30 pm on Thursday in week two. Arrangements were made for Christmas Day and for an extension of contact where statutory holidays were involved. There were significant details included in the parenting order which were designed to reduce the potential for conflict between the parents. Changeovers were to occur at [location B] and were to be facilitated by a named independent party, jointly funded by the parents. Interparental communication would only be through the OurFamilyWizard App, with urgent messages to be by text and telephone to be used in an emergency only.

[9] Judge de Jong’s orders were to become final in March 2020 unless lawyer for the child notified the Court otherwise. However, Mr [Nichols] had leave to apply to the Court to vary or replace the final parenting order once he secured accommodation

⁴ Dated 19 March 2019 and 28 August 2020 and Ms Renuka Wali is the author of both.

⁵ His Honour had five bundles of documents consisting of 1,200 pages before him. For the purposes of the two-day hearing before me there were a further 729 pages of documents in two new volumes filed.

in [location A]. Mr [Nichols] subsequently secured accommodation in [location A] and this litigation has continued since then.

[10] [Amanda] has continued to thrive. She is now attending primary school in [location A]. Unfortunately, her parents have continued to come into conflict, occasionally at times of changeover and sometimes over collateral issues concerning [Amanda]’s education or medical issues.

[11] [Amanda] has from time to time exhibited distress when being transferred by her mother into her father’s care. However, she settles quickly into her father’s care and the evidence satisfies me that he generally responds appropriately when she is upset. [Amanda] is clearly very fond of her older brother [Zachary] and it is important that she shares time with [Zachary] in her father’s care. It is clear she is also delighted with her new baby brother [Caleb].

[12] In the decision he delivered in October 2019, Judge de Jong noted the psychological evidence that made it clear that both parents needed to make an attitudinal shift. *“They need to be a lot kinder to one another. The sooner they realise they must work together, the better it will be for [Amanda]. Both parents demonstrate good parenting skills, but they are negative about the other and this compromises [Amanda]’s wellbeing.”*

The Parties’ Positions

[13] Mr [Nichols]’s proposal is that [Amanda] should be in his care in week one until school on Monday morning and in week two from Wednesday after school until Friday morning. His intention is to return to [location A] with [Amanda] each Sunday evening and remain in [location A] during that week so that [Amanda] can be in his care before and after school.⁶ His proposal for the Christmas holiday period during the 2021/2022 year is that [Amanda] be in his care from Friday until Tuesday in week

⁶ His specific proposal is that his partner [Carrie] will travel to [location A] with [Amanda] and stay the night on alternate fortnights. He will remain in [Auckland] so that [Zachary] can get to school on Mondays and on the alternate fortnights [Carrie] will be responsible for getting [Zachary] to school while he will be with [Amanda] in [location A]. He proposed that Ms [Mackie] should deliver [Amanda] to his care in [Auckland] on Friday evenings, with handover supervised by an independent third party.

one, and from Thursday to Friday in week two. He was asking to have time with [Amanda] from Christmas Eve until the middle of Christmas Day.

[14] During the 2022 year he proposed having [Amanda] in his care for six consecutive nights from Friday to Thursday each term school holiday extending to seven consecutive nights once [Amanda] reaches the age of six. He wants his care of [Amanda] to increase so that [Amanda] is in his shared care from Friday to Friday in alternate weeks once [Amanda] is six.

[15] Ms [Mackie]'s proposal in an affidavit that she swore on 4 November 2020, was that [Amanda] be in Mr [Nichols]'s care from Friday to Monday in week one, and from Wednesday to Friday in week two. She was seeking as a condition of the final parenting order that [Amanda] be in [location A] on the nights before she has school and that all changeovers occur at [Amanda]'s school. She proposed an independent supervisor, Ms Jenny Merrychurch, for supervised changeovers if changeovers could not happen at [Amanda]'s school.

[16] So, approximately a year ago Ms [Mackie]'s proposal for the time [Amanda]'s spent with her father in term time was identical to Mr [Nichols]'s current proposal.⁷ However, by the time of the hearing she had changed her position. She thought that four nights would be *“incredibly difficult for [Amanda]”*.⁸ She asked that the current pattern of care be confirmed as a final order. She explained that she was concerned that [Amanda] was *“... consistently saying she does not want to stay for longer, she – I see how she struggles with the two-night contacts compared to the one night.”* She said, *“she’s got a lot of valid issues with things that have been going on in [James]’s household. It’s not just a whim that she doesn’t want to go.”*

[17] When she was asked what the *“valid issues were”* she referred to an allegation that [Amanda] had witnessed vigorous arguments and an incident of violence between Mr [Nichols] and his partner [Carrie] at their home. *“... She talks a lot of witnessing a, what’s the word, explosive arguments between [James] and [Carrie] which really*

⁷ At least until [Amanda] is 6.

⁸ NOE p 52.

upset her, as I've mentioned as witnessing violence."⁹ She said reports of these arguments occurred "... *once a month but it wouldn't be every – not every month, like sort of random times she might say it when she comes back*".¹⁰ She said there had only been one report of physical violence, an incident where [Amanda] had told both Ms [Mackie] and a police officer that she had seen her father push [Carrie], who had fallen and cut her lip.

[18] The changeovers were at [location B] and were supervised by Ms Ashby. There had been a particularly difficult changeover on 11 December 2020. The parties were supposed to avoid face to face contact. Ms [Mackie] interpreted that as meaning that Mr [Nichols] should not be able to see her when she handed [Amanda] to Ms Ashby. Mr [Nichols] had been asked to park behind [the fast-food restaurant] with the changeovers to occur in front of [the fast-food restaurant]. He had declined to do that consistently, arguing variously that there was insufficient room for him to park there at times and that a prohibition on face to face contact did not mean that he was required to keep entirely out of sight.

[19] On 11 December 2020 [Amanda] was distressed and she was reluctant to leave her mother. Mr [Nichols] considered that the changeover was taking too long. He approached Ms [Mackie] and Ms Ashby and reached out to take [Amanda] from her mother's arms. Ms [Mackie] ran across the carpark away from him in a distressed state yelling "*keep away from me*". A passing police car had witnessed the incident and she and [Amanda] sat in the police car for some time while a number of police officers settled the situation, established that [Amanda] was to go into her father's care and the transfer was eventually facilitated.

[20] A police family harm occurrence report discussing this incident was produced through [Amanda]'s lawyer Ms Holm.¹¹ The police officer responsible for preparing that report recorded of [Amanda] "*crying heavily when told she has to go with her father. States that she does not want to be with [James]. States that she saw [James] pushing his girlfriend which stressed her and made her afraid of being around him.*"¹²

⁹ NOE p 71.

¹⁰ NOE p 71.

¹¹ Part of Exhibit B.

¹² It is not clear whether this police note records things they were told by [Amanda] or by Ms [Mackie].

[21] Ms [Mackie] had previously contacted the police to report the allegation that Mr [Nichols] had pushed [Carrie] on about 19 November 2020.¹³ As a result there was a visit by police to Mr [Nichols] and [Carrie]’s home. [Carrie] evidently assured the police that there had been no violence. Mr [Nichols] denied that there had been an incident where he had pushed [Carrie] when he spoke to the police and when questioned in court.

[22] Mr [Nichols] accepted there had been arguments between he and [Carrie]. He did not accept that they raised their voices to each other, and he denied that [Amanda] would have witnessed “*explosive arguments*”.¹⁴ He said [Amanda] would have witnessed not violent arguments but “... *non-violent resolution of different points of view*”.

[23] Ms [Mackie] does not really believe that [Amanda] enjoys her time with her father, and she does not yet accept that [Amanda] is safe with Mr [Nichols]. She thinks Mr [Nichols] does not comfort [Amanda] when she is upset. She is concerned that Mr [Nichols] has taken [Amanda] from [location A] to [Auckland] on a week night on at least one occasion and she is worried that may occur frequently during school weeks if his time with [Amanda] is increased, and that she will become tired.¹⁵ Her own trust of Mr [Nichols] has been eroded, she believes that he seeks to upset her whenever he can.

[24] It is clear to me from the evidence that [Amanda] enjoys her time with her father. That is corroborated, not only by the observations of Ms Wali over the course of two lengthy home visits with [Amanda] at her paternal home, but also from the evidence of the changeover supervisor Ms Ashby, who said that when [Amanda] returns from her father’s care she is calm and chatty, telling Ms Ashby about what she has been up to with her father. Ms Ashby also acknowledged that [Amanda] had been very happy to greet her father, smiling and running up to him at a recent changeover.¹⁶

¹³ NOE p 112.

¹⁴ NOE p 111.

¹⁵ The distance is just over 100 kilometres and the drive time at least 90 minutes each way.

¹⁶ NOE p 166.

The Law

[25] In making my decision I must hold the welfare and best interests of [Amanda] as my first and paramount considerations.¹⁷ In making that decision I have to bear in mind the principles in s 5 of the Care of Children Act 2004.

[26] I am reminded by the Supreme Court judgment of *Kacem v Bashir* that I must consider and address all of the s 5 factors and if a s 5 factor is not relevant, then I should note that it is not relevant.¹⁸ There is no particular weighting or emphasis to be given to any of the s 5 factors other than what is now s 5(a), which is expressed in mandatory terms, “*A child’s safety must be protected ...*” (emphasis added).

[27] I am required by s 6 of the Act to consider any views that [Amanda] expresses. I am satisfied that [Amanda] has had ample age appropriate opportunity to express her views, both through her lawyer Ms Holm and through the discussions with Ms Wali detailed in the two s 133 reports.

[28] I will deal with each of the s 5 principles in the context of [Amanda]’s welfare and best interests:

Section 5 Principles

[29] [Amanda]’s safety must be protected, and she must be protected from all forms of violence under s 5(a). The principal concern in this regard is the tension and occasional interparental conflict that has occurred at changeovers. Many attempts have been made to alleviate those concerns. Independent supervisors and a neutral venue have featured in the changeovers for a long time. [Amanda] is still displaying signs of distress, particularly when changeovers are facilitated by her mother. However, there has been no material conflict between the parties at changeovers since the 11 December 2020 incident.

¹⁷ Section 4, COCA.

¹⁸ *Kacem v Bashir* [2010] NZFLR 884.

[30] I find on balance of probabilities that both parties contributed in their own way to the distress that [Amanda] experienced on that occasion. Mr [Nichols] ought to have remained out of sight and ought not to have approached and reached out for [Amanda]. However, there was no need for Ms [Mackie] to “flee” from Mr [Nichols] while yelling. It may have been a distressing situation for her, but it is likely that her reaction will have increased [Amanda]’s anxiety both on that occasion and at subsequent changeovers.

[31] Since [Caleb]’s birth, changeovers have generally been facilitated by Ms [Mackie]’s partner [Stuart] and often by Mr [Nichols]’s partner [Carrie]. Tension is much reduced of late, and [Amanda] is exhibiting significantly less distress.

[32] There are other safety issues raised by Ms [Mackie] in explanation for her view that the proposal for contact that she made in November 2020 is no longer appropriate for [Amanda]. She is concerned [Amanda] has reported seeing Mr [Nichols] push [Carrie] during an argument. I accept that [Amanda] has said that happened both to Ms [Mackie] and to a police officer.

[33] In assessing whether [Amanda] will be safe in her father’s care what is required is a two-stage inquiry. Firstly, there needs to be a finding of fact as to whether the allegations of violence are proven and secondly, there needs to be a predictive assessment of whether [Amanda] will be safe in Mr [Nichols]’s unsupervised care if the violence is established.¹⁹ I might be left in a position where I am unable to find on balance of probabilities that the violence did occur but am also unable to find on balance of probabilities that the violence did not occur. I would then need to assess whether [Amanda] would be exposed to “*an unacceptable risk*” of physical abuse if unsupervised contact was ordered.²⁰ A risk is unacceptable “*if it is one to which the child should not reasonably be exposed. That in turn can only be measured in terms of possibility. If the possibility that abuse will occur or has occurred ... is great, then it may be an unacceptable risk to allow any access at all. If the possibility is slight, then the risk involved, even in unrestricted access may be acceptable. Within these*

¹⁹ *M v Y* [1994] 1 NZLR 527 (CA).

²⁰ This follows the approach in *M v Y* supra and in *S v S* [1994] 1 NZLR 540 CA.

*extremes, the magnitude of risk may depend very much on the kind of access that is allowed.”*²¹

[34] The allegations in this case are nowhere near the magnitude of gravity of the allegations in the cases of *M v Y* and *S v S*.

[35] [Carrie] was not summonsed and had not provided an affidavit to the Court. There is no evidence of any violent arguments or pushing apart from [Amanda]’s reports to Ms [Mackie] and possibly to an unnamed police officer, who was also not called to give evidence.²²

[36] In the absence of any other evidence and in the face of Mr [Nichols]’s denial I am unable to conclude on balance of probabilities that there was an incident of violence. I also do not consider that [Amanda] will be exposed to an unacceptable risk of violence, or of witnessing violence if I allow unsupervised contact to continue. Ms [Mackie] was not suggesting that contact should be supervised, only that [Amanda]’s time with her father should be limited.

[37] I conclude on balance of probabilities that [Amanda]’s unsupervised contact with her father is safe.

[38] Section 5(b) reminds me that [Amanda]’s care, development and upbringing should be primarily the responsibility of her parents and guardians. [Amanda]’s current pattern of care has seen Ms [Mackie] taking the lead in most aspects of her day to day care. This has led to Mr [Nichols] being somewhat excluded at times. For example, [Amanda] was attending the local playcentre and Ms [Mackie] was not willing to allow Mr [Nichols] to participate in any sessions with [Amanda]. While her wish to keep her distance from Mr [Nichols] was understandable considering how she feels about contact with him [Amanda]’s right to have her father fully involved in her life is not being fully met with the current pattern of care in place.

²¹ *M v Y* (supra) at 534

²² As I noted, it is not clear from the police report produced what exactly [Amanda] did say.

[39] Section 5(c) reminds me that [Amanda]’s care, development and upbringing should be facilitated by ongoing consultation or cooperation between her parents. While the prospect of full cooperation between her parents may seem remote now, there clearly needs to be better consultation about important guardianship issues such as medical decisions including [Amanda]’s vaccination status. Under the current parenting arrangements consultation and cooperation has been scarce. [Amanda] deserves better.

[40] Section 5(d) requires that [Amanda] should have continuity in her care, development and upbringing. Both of [Amanda]’s parents have been meaningfully involved in caring for her for a long time now. Neither of them is seeking to change that.

[41] Section 5(e) emphasises that she should continue to have a relationship with both of her parents and that her relationships with her wider family groups should be preserved and strengthened. The relatively short periods of time she has in her father’s care do not allow her to travel to meet any wider family or friends, nor is there sufficient time for her to enjoy longer holidays, or even just to spend a consistent period of time in her father’s care.

[42] Section 5(f) which stresses the need for [Amanda]’s cultural identity to be preserved and strengthened and does not really feature as a factor in this case.

[Amanda]’s Best Interests

[43] In assessing [Amanda]’s best interests I am significantly assisted by the evidence of Ms Wali. I was referred to the substantial body of psychological literature which discusses the detrimental effect of prolonged exposure to conflict on children.²³ Ms Wali noted that [Amanda] was very aware of the parental tensions and that she was aware of “... *her mother’s anger/discomfort about her father*”.²⁴ I agree with Ms Wali that it is in [Amanda]’s best interests that both parents ensure that they do not expose [Amanda] to their negative and mistrusting feelings about the other. I also agree that

²³ Section 133 report, 28/8/2020, para 10.31.

²⁴ Section 133 report, 28/8/2020, para 10.32

[Amanda]’s interests will be better served by transitions between her parents occurring from a neutral environment.²⁵

[44] Significantly Ms Wali noted that “... *there are significant benefits to children’s psychological and educational outcomes from positive father involvement, and a strong father-daughter relationship. A consensus has emerged in the literature that around 35% of time with a child is required to provide the required platform to promote the development and maintenance of meaningful parent/child relationships.*” She noted that “*the current time-shared falls below this threshold for optimally extending the quality of [Amanda]’s relationship with her father.*”²⁶ However “... *there is no evidence in the literature of a 50/50 split achieving better outcomes for children than other shared care (30% and above) arrangements.*”

[45] One of the concerns that has emerged throughout these proceedings is that there has been a significant level of “*gate keeping*” or “*control*” which has been exercised by Ms [Mackie]. Examples include Ms [Mackie] withholding relevant medical information about [Amanda] or preventing it being promptly provided to Mr [Nichols]. On one historical occasion she provided a forged Plunket record representing that [Amanda] had been immunised when in fact she had not been immunised.

[46] She was also insistent for a long time that [Amanda] should attend Play Centre where she was actively involved as a parent. Unfortunately, neither she nor the local play centre were comfortable with Mr [Nichols] attending that facility so he was effectively excluded from that aspect of [Amanda]’s life. When he proposed another local childcare facility, Ms [Mackie] was opposed on several grounds including claiming (incorrectly) that the entrance to the play centre was proximate to where she was living, and she was uncomfortable with Mr [Nichols] being regularly that close to her. In fact, the entrance was on another street some distance from the home occupied by members of her family and by that time Ms [Mackie] had moved to a rural location over 20 kms away, a matter that she did not disclose.

²⁵ Section 133 report, 28/8/2020, para 11.3.

²⁶ Section 133 report, 28/8/2020, para 11.7.

[47] While at one level those events merely illustrate the capacity for [Amanda]’s parents to find points of conflict and maintain that conflict for long periods of time, at another level they indicate that an order which sees [Amanda] spending longer periods of time in both of her parent’s care and an order which is sufficiently detailed to minimise the prospect of ambiguity, confusion and conflict is required to ensure that neither parent feels as if they are in a position of control.

[48] Such an order is also likely to ensure that both of her parents can contribute meaningfully to her care, upbringing and to the long term development of her identity.

[Amanda]’s Views

[49] Before I turn to the particulars of the orders that I am making I need to take [Amanda]’s views into account.

[50] Ms [Mackie] is correct that [Amanda] has consistently said that she does not want to spend more time in her father’s care. At one point early in her first interview with Ms Wali, she told the psychologist that she did not like her father, “*because I don’t like too many nights with him*”. However, she also reported her father as “*always happy*” and did not report any punishment or harsh treatment by her father or any impropriety by any other family members.²⁷

[51] Ms Wali noted that [Amanda] seemed to attribute angry feelings as emanating from her mother. She perceived her mother as being angry at her father or not liking him.²⁸ She was evidently aware, for example, that her mother did not approve of her father having visited play centre.

[52] [Amanda] also told Ms Wali that her mother sometimes cried, and she would give her mother a cuddle to comfort her. She did not know why her mother was crying.²⁹ Addressing [Amanda]’s distress at changeovers Ms Wali observed “*given the understandable emotional response of the mother to seeing her child upset, and*

²⁷ Section 133 report, 28/8/2020, para 8.13 and 8.14.

²⁸ Section 133 report, 28/8/2020, para 9.6.

²⁹ Section 133 report, 28/8/2020, para 8.4.

the close bond between [Amanda] and her mother; it is also likely that each – mother and daughter – inadvertently amplifies the other’s distress at the time of separation.”

[53] It was suggested by Mr [Nichols] that [Amanda]’s views might well be influenced by, or be an echo of, her mother’s opinions. There is some support for that proposition. In her report of 24 February 2021 Ms Holm recorded, “[Amanda] said that daddy wants her 3 nights but that she doesn’t want that, and that mummy is fighting for her.” That indicates that [Amanda] felt that her interests and her mothers were necessarily aligned, that they were allies in contest with her father.

[54] In her report of 16 June 2021, Ms Holm asked if there was anything [Amanda] wanted to tell the Judge. [Amanda] said, “*she forgot what her mum told her to say*”. Ms Holm said she wanted to know what she ([Amanda]) liked, not her mum. [Amanda]’s reply was “*that her and her mum like the same things*”.

[55] Given the consensus that [Amanda] is an empathetic child with a remarkable level of emotional intelligence for her age, it is inevitable that she would be very aware of her mother’s feelings. I do not consider it likely that Ms [Mackie] has consciously set out to deliberately influence [Amanda]’s views about much time she should spend with her father. It is clear though, that [Amanda] does not hold a view that is independent of her mother’s view on this issue.

[56] It is also clear that [Amanda] not only enjoys her time in her father’s care and in his household, but that he is a source of reassurance and comfort for her. [Amanda] told Ms Wali that when she was sad because she was missing her mum “*my dad gives me a cuddle*”. At the end of an interview with Ms Wali, [Amanda] returned to her father, gave him a hug and settled into his lap, much as she had done with her mother, which indicates the strong bond that she has with both her parents.

[57] Ultimately, I accept Ms Wali’s conclusion that although [Amanda] has a stronger affinity with her mother, she has developed a strong and secure bond with her father.³⁰

³⁰ Section 133 report, 28/8/2020, para 8.16.

[58] It is also clear and obvious that [Amanda] finds the tension and occasional conflict that accompanies changeovers to be a source of stress and at times distress.

[59] It is worth noting Ms Ashby's view that changeovers had preceded well with significantly fewer signs of [Amanda] being distressed after [Caleb] was born, when for a period of time changeovers were managed by [Carrie] and [Stuart] instead of by [Amanda]'s parents.

Other Issues for Resolution

[60] On 1 March 2021 Judge Partridge was able to record resolution of the following issues which would otherwise have been disputes under s 46R of the Act:

- (a) [Amanda] will be immunised in accordance with her doctor's recommendations.
- (b) [Amanda] will remain at the [local childcare centre] until she starts school.
- (c) [Amanda] will attend [location A] School from the start of Term 4, 2021.

[61] At the start of this hearing, an issue in dispute was whether and how Mr [Nichols] could have access to [Amanda]'s "*ManageMyHealth*" account. That was resolved after a discussion I had with the parties. They were able to agree that an independent gmail account should be set up in [Amanda]'s name with both of them to have the login and password details to access that account.

[62] There was also a dispute over how changeovers should be affected. Mr [Nichols] wanted [Amanda] brought to [Auckland] on Friday evenings, or at least for the changeover to continue to occur "*in Auckland*", meaning a changeover at a neutral venue such as the current [location B], which is approximately equal driving time between the parties. Mr [Nichols] was understandably concerned at the approximately three hours of driving that would be involved with for travelling to [location A] and back if he were to collect [Amanda] on a Friday.

[63] Mr [Nichols] also had the issue of having to attend to [Zachary] and collect [Zachary] from his school in Auckland at about the same time. Fortunately, [Carrie] is evidently able to assist as her work hours do not seem to clash with those changeover times.

[64] Mr [Nichols] was also of the view that Ms [Mackie] delivering [Amanda] to him and he returning [Amanda] to Ms [Mackie]'s care would send a message to [Amanda] that both of her parents supported the care arrangement. There might be some merit to that suggestion, but it has not worked well for the past few years.

[65] Now that [Amanda] is attending school there is a satisfactory neutral place where changeovers can occur. There is consensus that there needs to be continued supervision of changeovers at times when school is not available.

[66] There was also a concern about who should be responsible for [Amanda]'s care if she becomes ill on a school day of a changeover. Ms [Mackie]'s preference was that it should be the parent [Amanda] was going to after school, because [Amanda] could then go into their care if needed and remain in their care.

[67] On balance of probabilities I find that the alternative arrangement whereby the parent who has delivered [Amanda] to school should be primarily responsible for any care or medical attendances that are required is preferable. That view was supported by Ms Holm. The parent who has delivered [Amanda] to school will know the details of any recent symptoms or relevant events and of any medications that might have been administered. This is one situation where there might need to be some constructive communication between parents.

[68] There was also consensus that the orders that were made needed to be detailed and specific so as to avoid future confusion and conflict. I note that for several months the parties had the assistance of a very experienced psychologist, Dr Louise Smith, who was chairing sessions designed to resolve issues of difference and reduce conflict between them. Those sessions were discontinued at Dr Smith's initiative, I infer because relatively little progress was being made. That is an indication that this is not

a situation where the Court can leave it to [Amanda]’s parents to resolve issues as and when they can arise if that can be avoided through detailed orders.

Decision

[69] Ms Wali was not challenged in her view that the current arrangement is below the threshold for optimally extending the quality of [Amanda]’s relationship with her father.

[70] Mr [Nichols]’s submission that [Amanda] should now be in his care during term time for three nights in week one and two nights in week two aligns with the lower end of that optimal time. It also aligns with the position that Ms [Mackie] took in her affidavit of 4 November 2020. I find that nothing material has occurred since she swore that affidavit that indicates that she was wrong to think that was appropriate. I find that is a pattern of term time care that is in [Amanda]’s best interest and will promote her welfare.

[71] Mr [Nichols] was also asking for [Amanda] to be in his care over the Christmas holiday period for 2021/2022 on four nights in week one and one night in week two. Ms [Mackie] was concerned that would be too long for [Amanda]. However, particularly since this is a holiday period and I am confident that [Amanda] will enjoy this time with her father’s family.

[72] For the term school holidays in 2022 and in each subsequent year [Amanda] should spend seven nights in the care of each parent. Her week with her father should align with the week that [Zachary] is in his care.

[73] Ms [Mackie] was understandably concerned that [Amanda] might be travelling to Auckland frequently when in her father’s care, even if she had school at [location A] the following day. It is important that [Amanda] remains in [location A] the night before school unless there are unusual events or circumstances. I am not going to stipulate how often such occasions might arise. An example which had occurred recently was that [Zachary] had a significant Kapa Haka performance and [Amanda] travelled with her family to attend. No doubt she was tired at school as a result, but I

cannot say that it is inappropriate for [Amanda] to be involved in such important family events on an occasional basis.

[74] The final issue is whether there should be any phone or screen contact between [Amanda] and the parent who is not caring for her. Ms [Mackie] was of the view that phone or video contact might well unsettle [Amanda]. I accept that as a possibility but nonetheless find that it is appropriate that [Amanda] should have contact by video link (whether Facetime, Messenger, Zoom or whatever platform suits) or at least by telephone if video contact is not practicable, when she is away from either of her parents for more than two consecutive nights. In the absence of agreement to the contrary, that contact should occur on the second evening that [Amanda] is absent and each second evening thereafter. Contact should be timed to occur before [Amanda]'s evening meal if possible. The parties can communicate the details by WeChat but generally speaking, a set time should be complied with unless there are good reasons to the contrary. Phone calls/video calls should be limited to a 5 to 15 minute duration.

[75] Ms Holm has been involved with this family for a long time now and she is acutely aware of the dynamics that are at play. Since it is vital that the orders that I make achieve the goal that Ms Wali recommends, which is that there be "*a long term care plan that protects her from the interparental conflict and supports her development needs*" I am going to ask Ms Holm to file detailed orders for sealing and I will give her leave to include any additional clauses, details or protections which she considers will ensure the orders can be safely complied with, with minimal risk of future conflict or confusion. I invite her to file a draft which highlights any changes or additions and a brief explanatory memorandum. She may consult with the parties first, but she need not take on board any of their recommendations or suggestions. I am not asking for submissions from Mr [Nichols] or Ms [Mackie] on this issue, this is not about what they want, it is about ensuring that my orders will be effective.

Future Developments

[76] Mr [Nichols] was of the view that [Amanda] should be in his care on a week about basis from when she reached the age of six. The orders that I am making which will see [Amanda] sharing school holiday time with her parents and having five nights

a fortnight in her father's care will see [Amanda] spending nearly 39% of her time in her father's care.³¹ I do not have any evidence that establishes that [Amanda]'s best interests will be promoted by that figure being increased to a 50:50 division of care. This is not a situation where equal sharing is likely to reduce conflict or tension between the parties. Conflict and tension between the parties will be significantly reduced because I am reducing the opportunity for contact between the parties.

[77] I am therefore making a final order in terms which I find are likely to be appropriate for [Amanda] as she ages, and regardless of any future agreed changes that may occur to arrangements for her schooling for the like.

Orders and Directions

[78] I am making a final parenting order.

[79] All interim parenting orders are discharged, but the s 46R order that Judge Partridge made on 1 March 2021 continues in force and effect.

[80] [Amanda] is to be in Mr [Nichols]'s care:

- (i) In week one from the end of school on Friday until the start of school on Monday, with that term time contact to commence at the start of Term 1 2022. If a statutory holiday falls either side of that weekend care [Amanda] is to be in his care for that period as well.
- (ii) In week two from after school on Wednesday until the start of school on Friday, again commencing at the start of Term 1 2022.
- (iii) In the 2021/2022 summer school holidays, from 3.00 pm on Friday until 9.00 am until Tuesday in week one, and from 3.00 pm on Thursday until 9.00 am until Friday in week two.

³¹ Assuming there are a total of 12 weeks of school holidays that will be 42 nights in Mr [Nichols]'s care leaving another 20 fortnights in the year where [Amanda] will have five nights a fortnight in his care, a total of 142 days.

- (iv) In the term school holidays in 2022 and from then onwards, and in the summer school holidays in 2022/2023 and from then onwards from 3.00 pm on Friday until 3.00 pm the following Friday, so that [Amanda] is in the care of each parent on a week about basis. Mr [Nichols]'s care of [Amanda] should align with the times that [Zachary] is in his care, but the times that [Zachary] is in Mr [Nichols]'s care are not to change in order to subvert the intention that this provision provide stability and certainty.

- (v) In the event that [Amanda] is not attending school for any reason or if school is not open (otherwise than for term school holidays or summer holidays) [Amanda]'s time in Mr [Nichols]'s care shall start at 3.00 pm on the date contact starts and end at 9.00 am on the date contact ends.

[81] At all other times [Amanda] is to be in Ms [Mackie]'s care.

[82] Conditions are:

- (i) All changes in care are to occur with [Amanda] being delivered to and collected from her school while the school is open.

- (ii) During term school holidays, Christmas holidays or if school is otherwise not available for changeover, the changeovers are to occur at or adjacent to the [location A] shop. Changeovers are to be supervised by Ms Merrychurch. The parties should park as far away from each other in the carpark as is practicable, but the parent delivering [Amanda] should endeavour to park on or near to [street name deleted] and the parent collecting [Amanda] should endeavour to park at the back of the carpark near the southwest corner of the building. In the event of any disagreements the parties are to accept Ms Merrychurch's directions. It will not necessarily be possible for the parties to

remain out of sight of each other, but they are to avoid coming into close proximity so as to avoid any tension or conflict.

- (iii) If Ms Merrychurch is not available the first option is to use another independent supervisor. Ms Merrychurch may nominate an alternate supervisor.
- (iv) Where Ms Merrychurch or nominated alternative is available, the parent delivering [Amanda] should endeavour to arrive early, park and take [Amanda] to the supervisor, return to their car and leave. The supervisor can then deliver [Amanda] to the collecting parent's car.
- (v) The second option if no alternate supervisor is nominated is for changeovers to be facilitated by responsible adults known to [Amanda] other than her parents, for example [Carrie] and [Stuart].

[83] [Amanda] is to have contact by video link (whether Facetime, Messenger, Zoom or any other medium) where practicable or telephone, if the parent whose care she is not in, whenever she is in the other parent's care for more than two consecutive nights. That contact is to occur after 5.00 pm and before 7.00 pm but is not to conflict with [Amanda]'s mealtimes. Whenever practicable a set time established by the parent whose care [Amanda] is in is to consistently apply. Contact is then to occur each second evening. The video/phone calls are to be limited between 5 and 10 minutes duration depending on [Amanda]'s comfort levels.

[84] In Christmas 2021 [Amanda] will be with Mr [Nichols] from 1.00 pm on Christmas Day until 1.00 pm on Boxing Day. She shall be with Ms [Mackie] from 1.00 pm on Christmas Eve to 1.00 pm on Christmas Day in 2021. That pattern will apply for all odd years. For even years [Amanda] will be with Mr [Nichols] from 1.00 pm on Christmas Day and with Ms [Mackie] from 1.00 pm on Christmas Day until 1.00 pm on Boxing Day. At the end of that period [Amanda] shall return to the parent whose care she would have otherwise have been in.

[85] These care arrangements should not be impacted by events such as Father's Day, Mother's Day, either parent's birthday or [Amanda]'s birthday, save that on [Amanda]'s birthday the parent whose care she is in shall arrange a video or telephone call to the non-caring parent in line with paragraph [83] above.

Communication

[86] All communication between the parties about [Amanda]'s day to day activities including school events, extracurricular events such as upcoming friends birthday parties and the like, and any other non-urgent contact, should:

- (a) Be limited to what is reasonable and necessary in [Amanda]'s welfare and best interests.
- (b) Be polite, concise and factual.
- (c) Not contain any criticism or complaints. The parties are to remember that the details of [Amanda]'s care when she is with the other parent are matters for that parent's discretion.
- (d) Be by way of the OurFamilyWizard App.
- (e) Communication between the parents by text messages if there are urgent matters affecting [Amanda].
- (f) Be by way of telephone only in the event there are any emergencies.

[87] Other conditions:

- (a) Neither parent will belittle, denigrate or criticise the other to [Amanda] or in front of [Amanda].
- (b) Neither parent will question [Amanda] about the other or the other's friends, activities or way of life.

Health Account

[88] Ms [Mackie] who has the login and password details for [Amanda]'s ManageMyHealth account is to establish a new gmail address in [Amanda]'s name which is to be solely used for her ManageMyHealth account. Both parties are to have the login details and password and neither party is to change or alter either of those details without the other's prior written consent.

Guardianship

[89] The parties are reminded of their obligations as guardians under s 16 of the Care of Children Act 2004 and in particular of the need to consult in relation to important matters affecting [Amanda] including her name, changes in her place of residence that may affect her relationship with either of her parents, medical treatment that is not routine in nature, where and how she is to be educated and her culture, language, religious denomination and practice.

Directions

[90] Ms Holm is to prepare a detailed order for sealing. She also has leave to file a memorandum with a draft order which contains any details, additions or alternations which in her view will give better effect to the intent of these orders or better ensure that the orders are likely to work without the opportunity for contact and conflict between the parties in the future. She is to do that before 4.00 pm on 13 December 2021.

[91] Ms Holm is to meet with [Amanda] and explain the orders that have been made to her.

[92] Ms Holm's appointment as lawyer for [Amanda] will end on 20 January 2022 and she is thanked for her service to the Court, to [Amanda] and to the parties.

Costs

[93] This litigation has been difficult and protracted. However, I am confident that both parties have proceeded with their principal motivation being their views of what is in [Amanda]’s welfare and best interests. I am of the view that it would be appropriate for party and party costs to lie where they fall. This decision does not represent a “*win*” or a “*loss*” for either parent. It is focused entirely on the best outcome for [Amanda].

[94] The issue of a contribution to the costs of lawyer for the child or the child psychologist falls into a different category and if the parties wish their financial circumstances or any other issues to be taken into account on those issues they should file a submission with any supporting documents by 4.00 pm on 13 December 2021. Any submissions should be limited to no more than eight pages plus relevant supporting documents.

Signed at Auckland this 2nd day of December 2021 at 11.15 am

K Muir
Family Court Judge