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[SQUARE BRACKETS]

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**IN THE FAMILY COURT
AT TAURANGA**

**I TE KŌTI WHĀNAU
KI TAURANGA MOANA**

**FAM-2020-070-000513
FAM-2020-070-000512
[2021] NZFC 7884**

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| IN THE MATTER OF | THE FAMILY VIOLENCE ACT 2018 |
| IN THE MATTER OF | THE CARE OF CHILDREN ACT 2004 |
| BETWEEN | [MELANIE LYNCH] Applicant |
| AND | [PAUL MOODY] Respondent |

Hearing: 2 August 2021 and 6 August 2021

Appearances: M Olphert for the Applicant
J-W Howell for the Respondent
S Mather as Lawyer for the Child

Judgment: 16 August 2021

**RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO AN APPLICATION FOR A PROTECTION
ORDER AND PARENTING ORDER (SAFETY) ISSUES]**

[1] Ms [Lynch] and Mr [Moody] are the parents of [Charles Moody], born [date deleted] 2018. On 22 September 2020 Ms [Lynch] obtained on a without notice basis an Interim Parenting Order and a Temporary Protection Order. In support of those applications her affidavit contained not only allegations of physical and psychological abuse, but also an initial allegation that Mr [Moody] had sexually abused [Annabelle Lynch] (born [date deleted] 2016), her daughter from a previous relationship. However, as the proceedings have progressed, Ms [Lynch] now asserts that Mr [Moody] has sexually abused their son, [Charles]. Mr [Moody] denies that he has been violent and/or that he has sexually abused either [Annabelle] or [Charles].

[2] It became clear during Mr Howell's cross examination of Ms [Lynch] that she did not make the full and transparent disclosure that she should have when making a without notice application. She did not, for example, disclose her history of methamphetamine use,¹ or that her mother had applied for a parenting order in the past in relation to an older son, [Jeremy], because of concerns around [Jeremy]'s safety.² She also has convictions for making false statements to the police,³ and for possession of methamphetamine and utensils.⁴ The fact Ms [Lynch] has failed to make adequate disclosure to the Court and that she has convictions for lying are matters that I put to one side; I need to make my decision in this case solely on the basis of the evidence before me. But these factors again highlight the risks in the Court making orders, and particularly parenting orders, without notice on the basis of evidence that subsequently is shown to be inadequate.

[3] Resolution of the issue of sexual abuse is important in terms of the family violence proceedings as [Annabelle] is a child of Ms [Lynch]'s family and is entitled to automatic protection in terms of any Protection Order that is in force. But additionally, if the Court finds that Mr [Moody] has sexually abused [Annabelle] and/or [Charles], then that, together with the Court's findings in relation to the allegations of physical and psychological abuse under the Family Violence Act 2018, inform the Court's decision in relation to Mr [Moody]'s contact with [Charles], and in particular whether it is to be supervised or unsupervised. For Ms [Lynch] seeks that

¹ Notes of Evidence, p 5, lines 7–11.

² Notes of Evidence, p 6, line 19 to p 7, line 12.

³ Notes of Evidence, p 7, lines 25–29.

⁴ Notes of Evidence, p 6, lines 2–13.

Mr [Moody]’s contact in relation to [Charles] continue to be supervised at a Court approved supervised access centre.

Family Violence Act Proceedings

[4] It is accepted that the parties have been in a family relationship as defined in the FVA. They have been in a de facto relationship for three years, although it has been, as they both describe, an “on and off” relationship. In the context of the FVA proceedings I need to determine therefore:

- (a) Whether Ms [Lynch] and/or [Charles] and/or [Annabelle] have been the victims of family violence.
- (b) Whether Mr [Moody] sexually abused [Annabelle] and/or [Charles], as if so, that would be an act of family violence.
- (c) If the allegations of family violence are proven, then whether the making of a Final Protection Order is necessary for the protection of Ms [Lynch] and/or [Charles] and/or [Annabelle].

[5] The leading decision on the making of a Protection Order is that of the Court of Appeal in *Surrey v Surrey*.⁵ As Ms Mather sets out in her submissions, the Court is required to determine each and every allegation of violence on the balance of probabilities.⁶ Thus, for the reasons set out in the *Chauhan v Grewal*⁷ decision the Court of Appeal’s decision in *SN v MN*⁸ needs to be read in light of s 171(2) of the FVA.

[6] As the Court of Appeal set out in *Surrey v Surrey* if I determine that the allegations of violence are proven, I then need to consider the issue of necessity. Part of that assessment involves a consideration of Ms [Lynch]’s perception, and if I determine that her perception, when viewed objectively, is a reasonably held

⁵ *S v S* [2010] 2 NZLR 581.

⁶ Section 171(2), Family Violence Act 2018.

⁷ *Chauhan v Grewal* [2017] NZFLR 986.

⁸ *SN v MN* [2018] NZCA 332.

perception, then the Court of Appeal has held that I must make a Protection Order unless Mr [Moody] can point to any countervailing features as to why I should not make an order.

Has Mr [Moody] financially abused Ms [Lynch]?

[7] Psychological abuse pursuant to s 11(1)(e) of the FVA includes financial or economic abuse. Ms [Lynch] in her application for a Protection Order and affidavits in support asserts that she has been the victim of financial abuse. She does no more than simply assert that as a proposition. No evidential foundation has even attempted to be established by Ms [Lynch], and when Mr Howell, in his cross-examination, challenged her on this, Ms [Lynch] indicated that she was not pursuing that allegation.⁹ It is unacceptable to simply make a bald-faced assertion of abuse without any factual basis behind that assertion, particularly in support of a without notice application. That is because the Court makes its findings on the basis of evidence, not assertions, assumptions or speculation. On the basis that there is no evidence of financial abuse I do not find that allegation has been proven.

Has Mr [Moody] physically abused Ms [Lynch]?

[8] Physical abuse is family violence pursuant to s 9(2) of the FVA. More specifically, pursuant to s 9(3) violence can include a pattern of behaviour that can include coercive or controlling consequences on the victim of violence or causes cumulative harm. Ms [Lynch] makes a number of allegations against Mr [Moody] in relation to physical abuse. They are either denied by Mr [Moody], or accepted, but in the context of him acting in self-defence. Self-defence is defined in s 48 of the Crimes Act 1961:

Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

[9] The first issue therefore is what were the circumstances as Mr [Moody] believed them to be. The second issue is whether the force used by Mr [Moody] was

⁹ Notes of Evidence, p 18, lines 6–10.

reasonable having regard to the circumstances as he believed them to be. Associate Judge Gendall¹⁰ in the decision *Attorney-General v Leason*¹¹ held at [51]:

As to these defences [self-defence/defence of another] under s 48 [of the Crimes Act 1961], I accept the submission for the defendants that the defences must apply in civil proceedings. That is clear from the definition of “justified” under s 2 of the Crimes Act.¹²

[10] Thus, an argument of self-defence is available to Mr [Moody] in relation to proceedings under the FVA.

[11] The first allegation is that when Ms [Lynch] was pregnant with [Charles], Mr [Moody] pushed her to the ground. She alleges that his response was to promise that it was a “one off”, and it would never happen again.¹³ Mr [Moody]’s response was that he was wanting to go to Auckland to see some friends, but that Ms [Lynch] did not want him to go. His evidence is that she began attacking him, hitting, punching and scratching him to which he responded by tripping her in a controlled fall putting her on the ground to stop her from attacking him further. He denies knowing Ms [Lynch] was pregnant at the time. He accepts he apologised to her but says he did so because he still feels guilty for having to do this to Ms [Lynch] even though it was not his fault. Ms [Lynch]’s response in her affidavit of 16 November 2020 was to deny that she was put to the ground by way of a controlled fall. She says that he was off to Auckland to see his friends who are all meth addicts, that he lost his temper and pushed her to the ground. There is clearly a conflict in the evidence which I need to resolve.

[12] As set out above s 171(2) requires me to determine the allegations on the balance of probabilities. In relation to this incident, given the concerns around the reliability of Ms [Lynch]’s evidence as set out below, I am unable to determine whether Ms [Lynch] or Mr [Moody]’s explanation is the more accurate. Thus, I am unable to determine that allegation is proven on the balance of probabilities.

¹⁰ As his Honour was at that time.

¹¹ *Attorney-General v Leason* HC Wellington CIV-2010-485-1940, 31 August 2011, Gendall AJ.

¹² Additionally, at [50] Gendall AJ held that self-defence/defence of another could be established either under s 48 of the CA 1961 or under common law.

¹³ Affidavit dated 22 September 2020 at [5].

[13] The second allegation is that in October 2018 Mr [Moody] grabbed Ms [Lynch], held her down, and as a consequence she had bruises over her body. She attached photographs of her body evidencing those bruises. Mr [Moody]'s response was that she was attacking him and that Ms [Lynch] had slapped him in the face to which he again got her to the ground in a controlled fall to stop her violence. I do not accept the defence of self-defence in relation to this incident. While I accept Mr [Moody]'s evidence that Ms [Lynch] was slapping him in the face, given the extensive bruising on Ms [Lynch]'s body that was evidenced by the photographs, the force used by Mr [Moody] to cause those bruises was not reasonable in the circumstances as he believed them to be. That is, being slapped in the face should not result in a response which leads to significant bruising over Ms [Lynch]'s body. I accept as proven on the balance of probabilities that Mr [Moody] physically assaulted Ms [Lynch] in October 2018.

[14] The next allegation is on [date deleted] August 2020 Mr [Moody] punched Ms [Lynch] in the face resulting in a black eye. There again is a photograph of the black eye. Mr [Moody]'s response is that Ms [Lynch] was attempting to attack him, and he responded by punching her in the face; he again asserts that he was acting in self-defence. Again, his response in the circumstances as he believed them to be was entirely unreasonable. When viewed objectively when someone is attempting to attack you by pushing and slapping reasonable force would be pushing them away, holding them at arm's length, or perhaps pushing them so that they fell back to the ground. However, when someone is only attempting to attack you in the manner that Ms [Lynch] was attacking Mr [Moody], punching them in the face is not reasonable force. By punching her in the face that was an act of family violence and I find that allegation proven on the balance of probabilities.

Has Mr [Moody] psychologically abused Ms [Lynch]?

[15] Ms [Lynch] further alleges that throughout 2019 Mr [Moody] called Ms [Lynch] a "slut" and other horrible names, that he smashed her cellphones, and hid her keys. In relation to this incident she says three phones were smashed over a two year period. Mr [Moody]'s response is that he admits calling her a slut because he asserts that she was sleeping with a number of different men. He denies hiding her keys or

smashing her phones, although he accepts he smashed the phone of [Jeremy], an elder child of Ms [Lynch].

[16] Psychological abuse is defined not only in the Family Violence Act but also in case law. I rely upon the decision of his Honour Judge Walsh in *C v C*, where his Honour held that psychological abuse can include behaviour which is designed to provoke, annoy, demean, put down or belittle that person.¹⁴ Even if the allegation that Ms [Lynch] was having sex with a number of different men is correct, calling her a slut is unacceptable. It is a demeaning and derogatory term, and clearly designed to humiliate and put her down. Calling her a slut was an act of family violence and I find that proven on the balance of probabilities.

[17] Psychological abuse includes, pursuant to s 11(1)(c), “damage to property”. Family violence, pursuant to s 9(1), includes not only Ms [Lynch], but also [Jeremy] as Mr [Moody] has clearly been in a family relationship with [Jeremy]. Additionally, pursuant to s 79, the Court can make a Protection Order if it is satisfied that the respondent has inflicted family violence not only against an applicant, but also a child of the applicant’s family. [Jeremy] is clearly a child of Ms [Lynch]’s family. Therefore, the destruction of [Jeremy]’s cellphone is an act of family violence and I accordingly find that allegation proven on the balance of probabilities. I am unable to determine whether Mr [Moody] has destroyed other cellphones owned by Ms [Lynch].

[18] In 2020 Ms [Lynch] asserts that Mr [Moody] threatened to smash the TV, threatened to smash her phone, and strangled her and put her in a headlock. Mr [Moody] denies all these allegations. Because of concerns around Ms [Lynch]’s overall credibility I am unable to find these allegations proven on the balance of probabilities.

Has Mr [Moody] Sexually Abused [Annabelle] or [Charles]?

[19] Family violence includes sexual abuse. [Annabelle] is the daughter of Ms [Lynch], and [Charles] is the son of Ms [Lynch] and Mr [Moody]. They are children of the family and are therefore protected persons if a Protection Order is made. I need

¹⁴ *C v C* FC Ashburton, FAM-2009-003-13, 8 May 2009.

to determine the allegations made in support of the application for the Protection Order that Mr [Moody] has sexually abused [Annabelle], and now also [Charles], with the relevance of those findings directly impacting upon the COCA proceedings in relation to [Charles], particularly in terms of s 5(a) of COCA.

[20] In relation to [Annabelle] the allegation is first contained in the affidavit of Ms [Lynch] sworn by her on 22 September 2020. Ms [Lynch]'s evidence is that she and Mr [Moody] had recently separated, he having ended the relationship. Mr [Moody] had been away in Auckland for a period of time and had not seen the children for a while, so she suggested he come over on the weekend of 19 and 20 September to spend time with the children. Mr [Moody] in his cross-examination accepted he had been away as he said he needed a break from Ms [Lynch]. By this time his evidence is he advised Ms [Lynch] that he no longer loved her and that their relationship needed to end. His evidence is that their relationship was incredibly toxic and he had simply become exhausted because of the ongoing verbal and physical abuse from Ms [Lynch]. I accept his evidence in this regard.

[21] On Saturday, [date deleted] September Ms [Lynch] gave evidence that she had invited Mr [Moody] over to spend some time with the children. When putting the children to bed, she states that both children were unsettled and therefore both she and Mr [Moody] needed to help settle the children to get them to sleep. [Charles] and [Annabelle] were sharing a room. Her evidence is that she was settling [Charles] and that Mr [Moody] was settling [Annabelle]. After about 15 minutes she states she heard what can only be described as "slapping noises" coming from [Annabelle]'s bed. Her evidence is that she said: "What the hell is that noise?" to which [Annabelle] responded: "Daddy is annoying me." She said she immediately jumped out of bed, ripped the covers off [Annabelle]'s bed and that Mr [Moody] quickly rolled over. She stated that she asked Mr [Moody] to leave the house to which he refused and to which he responded: "What are you doing, it's not like I'm fuckin doing anything to her."¹⁵ Her evidence is that Mr [Moody] then went and slept on the couch. I was left in some doubt as to why she did not insist that Mr [Moody] immediately leave the house given that she is alleging that she thought at the time that he had sexually abused

¹⁵ Bundle of Documents, p 6 at [17].

[Annabelle]. After all, she has often had him trespassed in the past when she has wanted Mr [Moody] out of the house.¹⁶

[22] Ms [Lynch] states that she took [Annabelle] into her bedroom, and then the next morning she asked [Annabelle] what had happened the night before. Her evidence is that [Annabelle] said to her: “Daddy got his doodle out and he was rubbing it against me.” She then asked her if her daddy had touched her¹⁷ to which she said [Annabelle] responded: “He touched my fanny.” She then asked if this had happened before to which [Annabelle] responded: “Yes” saying that Mr [Moody] had come into her room and got on top of her.¹⁸ Mr [Moody] emphatically denies the allegations.

[23] Within a matter of days [Annabelle] was evidentially interviewed. During that interview she made no disclosures at all and is described as being extremely difficult to understand. The police investigated and have made the decision to not lay any charges on the basis that there is insufficient evidence of abuse to justify pursuing a prosecution.

[24] To the s 132 report writer Ms [Lynch] said that she: “Could hear [Mr [Moody]] touching himself and my daughter” and that Mr [Moody] was “playing with himself and [Annabelle]”.¹⁹ Further allegations are contained in that report. That report was completed by [name of report writer deleted] on 9 December 2020. That report details that [Annabelle] has subsequently disclosed to Ms [Lynch] that Mr [Moody] “put his hand down her pants and touched her fanny”, that three weeks prior to her interview with the social worker for the purposes of the s 132 report she found out Mr [Moody] had raped [Annabelle]. There were further disclosures that [Annabelle] has told her that: “Daddy has stuck his doodle in my mouth and has done sticky wees in my mouth,” and that [Annabelle] has: “Seen daddy put his doodle in [Charles]’s mouth.” [Annabelle] is also alleged to have made disclosures to Ms [Lynch]’s mother, Mrs [Heather Lynch], about “daddy weeing on her face and in her mouth”, and that:

¹⁶ Notes of Evidence, p 9, lines 6–9 for example.

¹⁷ Arguably a leading question.

¹⁸ Bundle of Documents, p 7 at [20].

¹⁹ Bundle of Documents, p 61.

“Daddy put [Charles] on top of me and tried to put us together and played with [Charles]’s doodle.”²⁰

[25] I need to determine therefore whether these allegations are proven or not. As Ms Mather sets out her submissions, the leading decision is that of the Court of Appeal in *M v Y* where the Court of Appeal held that:²¹

Where an allegation of sexual abuse is made – and the same as no doubt true of any allegation of misconduct bearing on the welfare of a child – the Court’s task is twofold. First, it must deal with the allegation; and secondly it must determine the application before in light of all the circumstances that are relevant to the child’s welfare, including its findings on the allegation...As the Court observed in *M v M* it does not follow that if an allegation of sexual abuse has not been made out, that conclusion determines the wider issue which confronts a Court when it is called upon to decide which is in the best interest of the child.

In dealing with the allegation, the Court should apply the civil standard of proof, commensurate with the gravity of the allegation. Applying that standard, it may be satisfied that the abuse has occurred. But I respectfully agree with the caution expressed in *M v M* at p 77; p 77,081 that “there are strong practical reasons why the Court should refrain from making a positive finding that sexual abuse has actually taken place unless it is impelled by the particular circumstances of the case to do so”. The Court may, on the other hand, be satisfied that the abuse has not occurred...It is then right that the allegation should be expressly rejected. In many cases, perhaps most, the Court will be unable to reach a conclusion with any confidence. It is in that situation that an assessment of risk must be made. That assessment may lead to the conclusion that there should be no contact between the parent and child, or to the conclusion that there should only be [contact] that is monitored or supervised or otherwise controlled or limited.²²

[26] Thus, it is important to remember that it is a Court being asked to make a finding, and the Court is required to do so on the basis of the evidence before it and in light of the principles set out by the Court of Appeal. Thus, because an allegation of abuse has been made, that does not automatically mean it is true as appears to increasingly be the populist view. Rather the Court is required to determine whether the allegation is proven on the balance of probabilities, but if it is unable to reach a conclusion that the allegation is proven, the Court may nevertheless find that there remains an unacceptable risk to children.

²⁰ Bundle of Documents, p 62.

²¹ *M v Y* (1993) 11 FRNZ 186.

²² *M v Y* at p 193 to 194.

[27] It is also important to recognise that even very young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would. This does not mean that a child is any more or less reliable than an adult. It is also important to recognise that very young children can be more open to suggestion than other children or adults, and that the reliability of the evidence of very young children depends on the way in which they are questioned. It is therefore important, when deciding how much weight to give to their evidence, to distinguish between open questions and obtaining answers from children in their own words from leading questions that may put words in their mouths. This is recognised in reg 49 of the Evidence Regulations 2007, although reg 49 does not depart from the general position that a child witness is no more or less reliable than an adult witness. Rather it is the risks that may arise in the way in which a child is questioned which can affect his or her reliability. Consideration of these issues requires an examination of the evidence.

[28] Ms [Lynch]’s evidence under cross-examination was different to that set out in her affidavit in some respects. For example, in her affidavit she stated that as soon as she heard noises, she leapt out of bed and ripped the sheets off [Annabelle]’s bed. However, in Court she stated that once she heard noises coming from [Annabelle]’s bed, her evidence was that she then got her cellphone out under the covers and turned the light on so that she could see²³ and only then did she run over and pull off the cover to “hopefully like catch him or something...”.²⁴ During her cross examination Ms [Lynch] was adamant that she did not ask any leading questions and that all she asked is: “I just wanted to know what happened when daddy was in bed” and “I just want you to tell me what happened when Daddy [Paul] was in bed with you.”²⁵ Her evidence is that [Annabelle] immediately disclosed that:

“Daddy got his doodle out and rubbed it up against me and put his hands down my pants and touched my fanny.”²⁶

[29] Then later on she said [Annabelle] stated to her:

²³ She thought this might have taken about five minutes.

²⁴ Notes of Evidence, p 28, line 2.

²⁵ Note of Evidence, p 28, line 17 and p 31, line 18–19.

²⁶ Notes of Evidence, p 28, line 18–19.

He got his doodle out and rubbed it up against me, and that's the very first thing that she said to me. And, um, and then, and then she went on to tell me that he'd put his hands down her pants and pinched her fanny and touched – and like went like this in a pinching motion that, that he pinched her.²⁷

[30] Thus, there are now additional disclosures from the initial allegations set out in the affidavit of Ms [Lynch]; it would appear that Ms [Lynch] is now asserting that [Annabelle] disclosed that Mr [Moody] touched and pinched her fanny.

[31] A few days before the hearing Ms [Lynch]'s mother, Mrs [Heather Lynch], swore an affidavit. Its admission into evidence, even though it was not directed and filed in the days prior to the hearing, was not opposed by Mr Howell. In that affidavit Mrs [Lynch] sets out a number of other disclosures that [Annabelle] has made to her, including:

“Daddy [Paul] put [Charles] on top of me and went like this (demonstrated clapping her hand palms together), he pushed hard on [Charles]'s back” and “Daddy [Paul] makes [Charles]'s doodle go hard...Daddy [Paul] wee'd on my face, it was yucky and sticky wees. I didn't like it. He put me in the shower and washed my hair...he put a lolly in my fanny and it got stuck. He couldn't get it out and it really hurt me.”²⁸

[32] Mrs [Lynch] acknowledges that at one point she asked [Annabelle] if her and [Charles] had clothes on. That was clearly a leading question.

[33] What also became apparent during Ms Mather's cross-examination of Ms and Mrs [Lynch] in particular is that there was what Ms Mather described in her closing submissions as “live discussions” in Mrs [Lynch]'s house (where Ms [Lynch] and the children went to live) on a constant basis around these allegations. It became apparent that [Annabelle] has subsequently made an allegation to Ms [Lynch] that she has been raped by Mr [Moody], and that she has made disclosures of abuse to a number of other family members. Thus, following her initial disclosure [Annabelle] has been in a home environment in which the issues of Mr [Moody]'s sexual abuse have been discussed,²⁹ where she has been encouraged to make ongoing disclosures, where she has been encouraged to feel unsafe with her father (with Mrs [Lynch] in particular

²⁷ Notes of Evidence, p 31, line 20–24.

²⁸ Affidavit 26 July 2021 at [4], [5] and [6].

²⁹ While not directly in front of [Annabelle], in the household in which [Annabelle] lived there were ongoing discussions between the adults, and I cannot rule out the possibility that [Annabelle] overheard these discussions.

telling [Annabelle] that she is now safe in her grandmother's home). More latterly she has been receiving play therapy which has been on the basis that she has been the victim of sexual abuse. Significantly, in the context of that play therapy she has made no disclosures of sexual abuse at all.

[34] During Ms [Lynch]'s cross-examination it came to light that [Annabelle] has been assessed by a paediatrician.³⁰ The report from the paediatrician was presented to the Court. Ms [Lynch] indicated that the physical examination of [Annabelle] showed that her hymen was intact, apart from a slight tear which the paediatrician said would be consistent with riding a bicycle. As I understand Ms [Lynch]'s evidence, the paediatrician's report did not support a conclusion that [Annabelle] had been sexually abused.³¹ This is evidence adverse to Ms [Lynch]'s case and I have no reason to doubt her truthfulness in relation to this evidence.

[35] Thus, to Mrs and Ms [Lynch], [Annabelle] is alleged to have made these initial disclosures, and then evolving disclosures in the context of living environment in which the issue of her sexual abuse by her father was the subject of ongoing discussions within the household in which she lived. However, to a specialist child interviewer who, as Mr Howell has submitted, is specifically trained in interviewing children, [Annabelle] made no disclosures and was described as being unintelligible. While I accept that a victim of abuse may not always remember everything that occurred during the initial disclosures made, I find it curious that [Annabelle] did not, proximate to the initial disclosure, disclose that she had been raped by her father. When disclosing the rape, she is said to have described the pain of penile penetration as "cutting like a knife"; I find that phrasing improbable from a four year old, especially given [Annabelle]'s lack of verbal skills such that an evidential interviewer was unable to comprehend what she was saying to her. I also note that to her play therapist [Annabelle] has made no disclosures of abuse.

[36] Thus, the only disclosures made by [Annabelle] have been principally to her mother and grandmother, who are apparently the only people who can understand [Annabelle]. In part, [Annabelle]'s disclosure to her grandmother followed a leading

³⁰ Notes of Evidence, p 37, line 23 to p 38, line 20.

³¹ Notes of Evidence, p 75, lines 5–11.

question. As set out above, disclosures by children are not inherently unreliable because they are made by children. But disclosures of very young children need to be treated with caution, particularly in recognition that they can be more prone to suggestibility. Both Ms [Lynch] and her mother have at times asked [Annabelle] leading questions.

[37] Ms [Lynch] was clear in her evidence that prior to this apparent disclosure she had no concerns for [Annabelle]’s safety around Mr [Moody], and that there was nothing in [Annabelle]’s behaviour to give her a concern that there was anything untoward in [Annabelle]’s relationship with Mr [Moody]. This is not uncommon where there are allegations of abuse. However, on [date deleted] September [Annabelle] is alleged to have disclosed that there had been previous and ongoing sexual abuse of her to Ms [Lynch]. Prior to that date, Ms [Lynch] had not noticed any injuries to [Annabelle]’s vagina, [Annabelle] had not complained of any pain, [Annabelle] was not wary about her stepfather, and [Annabelle] was not acting out in a sexualised manner. Yet Ms [Lynch]’s evidence was that immediately following the initial disclosure, [Annabelle] began constantly to act out in a sexualised manner, began to express distress about her stepfather, and began to talk about sexual matters. It seems inconsistent that the immediate and subsequent sexualised behaviours of [Annabelle] only appeared after her disclosure that she had been previously the subject of sexual abuse, including being raped by her father. As an experienced Family Court Judge having heard from many psychologists over the years, I find it improbable that a four year old child would have the cognitive capacity to compartmentalise her previous abuse, only beginning to immediately act out sexually following her initial disclosure.

[38] Ms [Lynch] also asserts that Mr [Moody] has allowed [Annabelle] to view pornography on his phone. That allegation arose out of [Annabelle]’s comment to her mother that there were other women in the home and from that comment Ms [Lynch] has assumed [Annabelle] has been exposed to pornography.³² Ms [Lynch] has absolutely no evidence to substantiate her allegation that Mr [Moody] has shown [Annabelle] pornography, and the allegation is pure speculation on her behalf.

³² Notes of Evidence, p 21, lines 19–27.

[39] I note that Ms [Lynch] is a victim of sexual abuse herself as a child. This gives her an understandable and heightened concern for her own children but does not mean that her evidence is to be treated with caution. I place little weight on the fact that she was herself a victim of childhood sexual abuse.

[40] I have a clear view that the subsequent disclosures by [Annabelle] are unreliable, and therefore there is no reliable evidence that [Charles] has ever been sexually abused by Mr [Moody]. The ongoing disclosures have been in the context of ongoing discussions between Ms [Lynch] and Mrs [Lynch] about Ms [Lynch]'s belief that [Annabelle] had been sexually abused. Ms [Lynch] in her evidence was highly distressed by the allegations, and she was emotionally dysregulated. That is understandable given the nature of the allegations and her concerns. But I was left in little doubt that when she is discussing these issues she becomes emotionally labile and agitated and it is unlikely that [Annabelle] and/or [Charles] would have been protected from her emotional reaction to discussions about the allegations of abuse. Additionally, [Annabelle] appears to have been encouraged to talk to a number of different family members.³³ I have no doubt that if [Annabelle] were to make a disclosure now that a prosecution would be unlikely because the ongoing discussions about the allegations of abuse within [Annabelle]'s family could be argued to have led to a tainting and the sowing of seeds in her young mind.

[41] I also consider the evidence of Mr [Moody]. He denies the allegations and that is often the case in such circumstances and I place no great weight on his denial at all. But significantly he gave evidence that the room was not as dark as Ms [Lynch] made out. For as Ms [Lynch] had said in her evidence these parents were putting the children to bed and he was waiting for a nod from Ms [Lynch] as to when they could leave. Additionally, whilst acknowledging that [Annabelle] was making some noises he says it was because she was thirsty but Ms [Lynch] refused to give her a drink of water. The noise described and demonstrated by Ms [Lynch] was entirely consistent with that of the evidence of Mr [Moody] of [Annabelle] smacking her lips and indeed in demonstrating the noise Ms [Lynch] similarly smacked her lips.

³³ Notes of Evidence, p 23, lines 19–24.

[42] But even leaving aside the evidence of Mr [Moody], the disclosures themselves for the reasons I have set out, are unreliable and cannot be afforded any significant weight. I note that Mr Olphert conceded in his closing submissions that the disclosures of [Annabelle] could not be seen as being reliable.

[43] The cumulative concerns I have set out have led me to conclude that the allegations are not proven on the balance of probabilities; I am left with serious doubts as whether any abuse has in fact ever occurred. The factors that I rely upon are that this is a child who has made no disclosures to a specialist evidential interviewer³⁴ or her trained play therapist. To experts she has been unintelligible and has made no disclosures. Thus, I have been asked to rely upon a disclosure which only her mother and grandmother are said to be able to understand, and which have not been made outside of the context of the family environment and to those specifically trained in interviewing and counselling children. The disclosures were allegedly made at a time when Mr [Moody] had just advised Ms [Lynch] that he no longer loved her and that their toxic relationship was at an end.

[44] It is therefore my determination that the allegations have not been proven on the balance of probabilities.

[45] Furthermore, I have a clear view that the allegations of rape, of the sexual abuse of [Charles], and of Mr [Moody] weeing over [Annabelle] are simply untrue and did not occur. This is a case in which the evidence is so unreliable that I have no difficulty in making a positive finding that Mr [Moody] has not sexually abused [Annabelle]. Rather it is my finding that Ms [Lynch] heard what she thought was Mr [Moody] masturbating in bed,³⁵ and that she immediately reached the conclusion that he was engaged in sexual activity with [Annabelle], and having become immediately convinced that that was what occurred, she subsequently developed her own narrative and belief around what has occurred. This belief influenced the way in which she interpreted [Annabelle]'s comment that her father was being annoying, and her subsequent questioning of [Annabelle]. I have no doubt that she genuinely believes

³⁴ Despite having allegedly made disclosures to a number of family members before talking to the evidential interviewer; Notes of Evidence, p 34, lines 1–18.

³⁵ I accept his evidence that he was not doing so.

[Annabelle] and [Charles] have been sexually abused by Mr [Moody]. However, objectively the evidence does not establish there has been any abuse at all.

[46] I want to acknowledge that Ms [Lynch] and her mother have genuinely held beliefs that [Annabelle] has been sexually abused. But my role is to determine the issue on the basis of the evidence before me and for the reasons I have set out the evidence is simply too unreliable to enable me to conclude that there has been any abuse of [Annabelle] and/or [Charles]. That involves me considering the relevant law and applying that law to the facts before me.

Conclusion on Family Violence Matters

[47] I have therefore concluded that Mr [Moody] has been violent towards Ms [Lynch], but not towards [Annabelle] and/or [Charles] by way of sexual abuse. I now need to consider the issue of necessity. That requires a consideration of Ms [Lynch]'s perception pursuant to s 83 of the Act and the matters set out in ss 81 and 82 of the Act. It was quite clear from Ms [Lynch]'s evidence that she remains fearful of Mr [Moody], although principally her concerns and fears are around her belief that he has sexually abused [Annabelle] and [Charles]. In considering the issue of necessity I need to weigh up whether Ms [Lynch]'s belief and the need for protection is, when viewed objectively, a reasonably held belief. The fact she has been violent towards Mr [Moody] is irrelevant as, consistent with the objects of the Act, there is no excuse for domestic violence and all family violence needs to be rejected. I do note that if Mr [Moody] had made an application for a Protection Order against Ms [Lynch], I would have been likely to have found that she had been violent towards him, and would have considered making a Final Protection Order in favour of Mr [Moody].

[48] While I accept that there is some merit to Mr Howell's submission that this was violence in the context of a toxic relationship, now that the relationship is at an end, the likelihood of further violence is greatly reduced. However, these are parents of a three and a half year-old and who will need to have an ongoing relationship in the foreseeable future (notwithstanding Ms [Lynch]'s view that Mr [Moody], if she had her way, would never have a relationship with [Charles]). It is my decision that Ms [Lynch]'s fears and beliefs around Mr [Moody]'s violence are, when viewed

objectively, reasonably held beliefs and fears. Thus, in terms of *Surrey v Surrey* I now need to make a Final Protection Order unless Mr [Moody] can point to any countervailing features. In that regard Mr Howell sets out in his submissions that:

- (a) Mr [Moody] has completed the Living Without Violence programme.
- (b) That faced with the allegations of sexual abuse whilst he responded by going on a methamphetamine “bender”, he did not try to contact or abuse Ms [Lynch].
- (c) That the parties’ relationship is clearly over and that Mr [Moody] has now entered into a new relationship and therefore moved on.
- (d) That he was able to demonstrate an acceptance of his violence and the effects on Ms [Lynch].

[49] Notwithstanding these issues I remain of a view that the Protection Order is necessary for Ms [Lynch]’s protection at this point in time as these are parents who will need to have an ongoing relationship as parents of [Charles], and who have just endured a hearing in which Mr [Moody] has had to defend serious allegations of sexual abuse. I intend therefore to make a Final Protection Order as it remains necessary for the Protection of Ms [Lynch].

Parenting Issues

[50] In determining the day-to-day care and contact issues, my first and paramount consideration has to be the welfare and best interests of [Charles].³⁶ This needs to be an individualised assessment recognising that [Charles] is a unique child in a unique family environment.³⁷ Pursuant to s 4(2)(a)(ii) I need to take into account the relevant principles in s 5 of the Act. The Supreme Court in *Kacem v Bashir* has held that I need

³⁶ Care of Children Act 2004, s 4; there is no application by Mr [Moody] for contact in relation to his stepdaughter, [Annabelle].

³⁷ *Brown v Argyll* [2006] NZFLR 705; Care of Children Act 2004, s 4.

to identify not only those principles that are relevant, but also those that are irrelevant and to explain why.³⁸

[51] Pursuant to s 6 I am required to consider any views of [Charles] if he has expressed any, although those views need to be weighed against his age and maturity.³⁹ Throughout these proceedings [Annabelle] and [Charles] have been more than ably represented by Ms Mather, and she has in her reports set out the factors which impact upon both children's best interests and welfare.⁴⁰ [Charles] is three and a half. He has not expressed any clear views and the role of Ms Mather, in terms of s 9B of the Family Court Act 1980, has been to advocate [Charles]'s welfare and best interests.

[52] On the facts of this case the principles in ss 5(a) to (e) inclusive are relevant. There is no evidence to require a consideration of s 5(f) on the facts of this case. Sections 5(b) and (c) are centred in [Charles] being in the care of his parents and for there to be ongoing responsibility and consultation and communication between his parents as [Charles]'s parents and guardians. On the facts of this case those principles are purely aspirational. Ms [Lynch] if she had her way would have nothing more to do with Mr [Moody] at all. That is understandable in light of her concerns around her firmly held belief that Mr [Moody] has sexually abused [Annabelle] and [Charles]. I remind her that she has positive obligations under s 16(5) of COCA, and she must consult with Mr [Moody] in relation to all major guardianship decisions that affect [Charles].

[53] Section 5(d) provides for there to be continuity of care. Ultimately, Mr [Moody] is seeking a shared care arrangement but at this point in time his focus is in having either unsupervised contact with [Charles], or alternatively contact supervised by his parents. Continuity of care is a principle that I give significant weight to.

³⁸ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

³⁹ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 9.2; *C v S* [2006] 3 NZLR 420. See also *Moore v Moore* [2014] NZHC 3213, [2015] 2 NZLR 787 where Brown J reaffirmed the *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, [1985] 3 All ER 402 competency test.

⁴⁰ In accordance with her statutory obligations pursuant to s 9B of the Family Court Act 1980.

[54] Sections 5(d) and (e) are centred around [Charles] having a relationship with both of his parents and with his wider family. Clearly, Ms [Lynch] has significant family members who are important to [Charles]. Similarly, Mr [Moody]'s parents have had a good relationship with [Charles] and will need to do so in the future in order for their relationship to be preserved and strengthened. If Mr [Moody] is re-partnering, then his new partner and her children will become significant members of [Charles]'s family group.

[55] The real issue in this case is s 5(a). On the facts of this case both parents have been violent to each other, although Mr [Moody]'s violence has been more physical and more serious than the violence of Ms [Lynch]. However, as I have set out above there have been occasions in which Ms [Lynch] has physically attacked Mr [Moody] and in which she has been verbally abusive and therefore psychologically abusive towards him. I raised a concern of Mr Olphert as to why it was being argued that Mr [Moody]'s contact should be supervised, and yet no consideration was given in his submissions as to whether his client's care required any form of supervision given her acknowledged violence. If the scourge of violence in family relationships with Aotearoa is to be addressed, then there needs to be a recognition that all violence, including violence by primary caregivers, is unacceptable. As Ms Mather submitted in her closing submissions this is a case in which there are risk issues around both parents. For both children there are ongoing psychological risks for each of them if Ms [Lynch] does not accept the findings of the Court and continues to maintain that Mr [Moody] presents a risk to the children's sexual safety, particularly if she expresses that view to [Charles]. For it is quite clear to me that [Annabelle] now honestly believes that she has been a victim of sexual abuse, and that Mr [Moody] is a risk to her safety and that the only safe person for her is her mother. I would be concerned if those views were reinforced to [Charles].

[56] I have real concerns for [Charles] given that the emotional deregulation of Ms [Lynch] in relation to the issues around the allegations of abuse, that the parental conflict for [Charles] will continue and that he will be encouraged by Ms [Lynch] to view his father through a lens of abuse and risk. I am anxious therefore for [Charles] in terms of his future psychological wellbeing. There is clearly a risk for [Charles] if he continues to be exposed to his parents' conflict. That can be partly addressed

through there being managed changeovers so that [Charles] does not need to see his parents together. I would urge Ms [Lynch] to ensure that [Charles] is not exposed to her negative views about Mr [Moody].

Other Risk Factors

[57] Ms [Lynch] maintains that Mr [Moody] is still a heavy user of methamphetamine. There is no doubt that Mr [Moody] has had a significant criminal history involving the use of what Mr Olphert aptly describes as polysubstance abuse. He has spent significant periods in custody for dealing in methamphetamine. Mr [Moody]'s evidence is that following his imprisonment in 2010 he has all but stopped using methamphetamine. He candidly acknowledged that as part of his parole conditions he was to attend the Odyssey House residential programme, that he left in breach of the programme and was subsequently re-called to prison. However, nine months later he was released and completed the Hanmer Clinic programme. His evidence is that he has occasionally used methamphetamine, and that the last occasion in which he did so was upon finding out about the allegations of sexual abuse against him. Hair follicle tests have been provided which show that he has been clean of all illegal drugs for the last nine months and Mr Howell has suggested in his closing submissions that Mr [Moody] could provide two further tests to provide a longitudinal perspective.

[58] Mr [Moody] in his evidence also set out that during their relationship Ms [Lynch] used methamphetamine. This was denied by Ms [Lynch]. I prefer the evidence of Mr [Moody] in this regard. I found him to be a reliable witness, and at times he answered honestly even if evidence was adverse to his position. He was able to give detailed narratives around the occasions in which he has used methamphetamine, and I found him to be an honest and reliable witness. He candidly acknowledged that he had made many mistakes in his life, but also set out the significant steps he has taken to improve his position in life. Mr [Moody] is clearly a different man to who he was when he was sentenced to prison in 2010 and I commend him for the changes he has made in his life. He still has a way to go, particularly around his violence, and he himself acknowledged that he now needs to ensure that he is totally abstinent from methamphetamine. For being required to have supervised

contact with [Charles] has been a wake-up call for him and he is adamant he will not do anything to jeopardise his ongoing relationship with [Charles]. There is no evidence before me that Mr [Moody] at this point in time presents a risk to the safety of [Charles].

[59] In terms of Ms [Lynch], while I am concerned as to the psychological risk she presents to [Charles], and her pattern appears of engaging in relationships with men who are violent towards her, in terms of her day-to-day care of [Charles] she appears to be meeting his basic needs. It is my determination that apart from the psychological risks I have identified [Charles] is otherwise safe in Ms [Lynch]'s care.

[60] Mr [Moody] wants his parents to provide supervision if supervision is determined to be necessary on an ongoing basis. Ms [Lynch] opposes that occurring. There is no basis for her opposition at all. Her opposition appears to be centred around their inability to recognise whether Mr [Moody] is under the influence of drugs or not. But as Ms Mather set out in her submissions even trained supervisors at a Court approved supervised access centre do not always recognise that someone attending their centre is under the influence of drugs, particularly methamphetamine.

[61] Mr and Mrs [Moody] were available for cross-examination. Mr [Moody] Snr in particular impressed as someone who is entirely focused on the safety of [Charles] who would stand up to his son if required and would remove [Charles] if [Charles] was ever placed in a situation of risk. I have no difficulty concluding that they are safe and appropriate people to provide supervision and I agree with Ms Mather there is no real reason why they should not act as supervisors.

[62] Mr [Moody] needs some time with supervised contact to rebuild his relationship with [Charles] and to have it more normalised away from KidzKare. When I read the reports from KidzCare, there are no identified concerns around Mr [Moody]'s relationship with and care of [Charles]. That he has an ongoing relationship with [Charles] is important in terms of the s 5 principles. Further supervision also affords an opportunity for another hair follicle test result to be provided as that will then provide a lengthy period in which Mr [Moody] has been drug free. Provided that is clean for the presence of any illegal drugs, then the order I make will automatically

become final. I am satisfied that there are no safety concerns for [Charles] in Mr [Moody]'s care,⁴¹ and the supervision is purely for the purposes of reacquaintance and not in relation to any safety concerns. It is in the best interests and welfare of [Charles] to have an ongoing relationship with his father, and it is safe for that relationship to be unsupervised.

[63] Against that background and for those reasons I make the following orders and directions:

- (a) The Temporary Protection Order dated 22 September 2020 is discharged.
- (b) I make a Final Protection Order in favour of Ms [Lynch] with Mr [Moody] as the respondent.
- (c) I make no further direction for the completion of a Stopping Violence programme noting that it has already been completed.
- (d) There will be special conditions of the Protection Order as follows:
 - (i) Mr [Moody]'s contact with [Charles] in accordance with the terms of any Parenting Order shall not constitute a breach of the Final Protection Order.
 - (ii) Any text communication between Ms [Lynch] and Mr [Moody] in relation to any parenting or guardianship issues affecting [Charles] shall not constitute a breach of the Protection Order.
- (e) The Interim Parenting Order dated 22 September 2020 is discharged.
- (f) I make a new Interim Parenting Order in relation to [Charles] in the following terms:

⁴¹ Provided he remains drug free.

(i) [Charles] is to be in the day-to-day care of Mr [Moody] as follows:

(1) In a three week cycle for the first two weekends, from daycare Friday until the start of daycare Monday. Mr [Moody] will be responsible for collecting and returning [Charles] to and from daycare, or to and from school once he commences school.

(2) For four weeks each year to be taken (not consecutively) over the school term or Christmas holidays on such weeks as agreed. If no agreement can be reached, then on such weeks are determined by Mr [Moody] provided he gives Ms [Lynch] not less than six weeks' notice of the week [Charles] will be in his care.

(3) [Charles] shall be in his father's care from 12 noon Christmas Eve until 3 pm Christmas Day, and in his mother's care from 3 pm Christmas Day until 5 pm Boxing Day in odd numbered years and his mother's care from 12 noon Christmas Eve until 3 pm Christmas Day, and in his father's care from 3 pm Christmas Day until 5 pm Boxing Day in even numbered years.

(4) Such other times as the parties can from time to time agree.

(ii) [Charles] shall be in his mother's day-to-day care at all other times.

(g) The above parenting order is conditional upon the following:

(i) Mr [Moody]'s contact is to occur at the home of his parents.

