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[SQUARE BRACKETS]

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**IN THE FAMILY COURT  
AT AUCKLAND**

**I TE KŌTI WHĀNAU  
KI TĀMAKI MAKĀURAU**

**FAM-2017-090-000360  
[2020] NZFC 4224**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[VICTOR SWINBURNE] Applicant
AND	[PENELOPE STEARNE] Respondent

Hearing: 11 June 2020

Appearances: S Barber for the Applicant  
A Castle for the Respondent  
E Stenhouse-White as Lawyer for Child

Judgment: 14 July 2020

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**RESERVED JUDGMENT OF JUDGE K MUIR**

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## Introduction

[1] [Hemara Stearne] was born on [date deleted] 2014 and is now six. His parents are the applicant Mr [Victor Swinburne] ([Mr Swinburne]) and Ms [Penelope Stearne] ([Ms Stearne]).

[2] [Hemara] has not seen his father or spoken to his father since around 10 November 2018.

[3] On 30 November 2018 Judge Geoghegan made an interim order suspending contact between [Hemara] and his father until further order of the Court, recording:

The order is warranted given an allegation of sexual abuse and given the careful and detailed evidence of the applicant in respect of the allegation.

[4] The allegation of sexual abuse was that [Hemara] had told his mother that [Mr Swinburne] – who [Hemara] calls [Papa Victor] – had touched or squeezed his ure (penis) and his raho (testicles) at some time prior to 22 November 2018.<sup>1</sup> [Hemara] subsequently repeated his account, at least in part, to an Oranga Tamariki psychologist during an evidential video. [Ms Stearne]’s position was that [Hemara] should remain in her sole care. She “vehemently opposes any contact between ([Mr Swinburne]) and [Hemara]”.<sup>2</sup> She said, “*there are other father figures*” which might come into his life “*but not his actual dad*”. [Ms Stearne] is concerned to ensure that [Hemara] is protected.

[5] [Mr Swinburne] denies the allegations. He is seeking unsupervised contact with [Hemara]. He was unsure as to whether he would accept supervised contact, expressing concern about “*the whole stigma*” that would attach to him because a number of people were aware of the allegations that had been made.

## Issues

[6] The issues that I need to determine are:

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<sup>1</sup> [Hemara]’s last visit with [Mr Swinburne] had ended on [date deleted] 2018.

<sup>2</sup> Closing submissions of Mr Castle.

1. Are the allegations of sexual abuse proven on the balance of probabilities?
2. Alternatively, can I be certain that sexual abuse did not occur? Are the allegations “baseless”?<sup>3</sup>
3. If I do not find, on the balance of probabilities, that sexual abuse did occur, and I do not find that sexual abuse did not occur, is there a “real risk” to the child? If so, what if any contact should [Mr Swinburne] have with [Hemara] and what if any, supervision, support or other safety precautions should be imposed taking into account the matters above?
4. Should a s 133 report be obtained? If so, what should the brief be?
5. Should these proceedings be transferred to the [location 1] Court?

### **Relevant History**

[7] [Mr Swinburne] and [Ms Stearne] had been living together in Australia for eight years and [Hemara] was born there.

[8] [Mr Swinburne] has an older son [Paiwa] who is now [a teenager]. [Ms Stearne] said [Mr Swinburne] showered with [Paiwa] when he visited them in Australia as a 10 year old. [Mr Swinburne] denied that.

[9] In [early] 2014 while they were living in Australia [Ms Stearne] had obtained a Domestic Protection Order against [Mr Swinburne]. [Mr Swinburne] said there was one incident of pushing. [Ms Stearne] said there had been earlier incidents of domestic violence and “*mental abuse*” - arguments escalating to the point [Mr Swinburne] would yell at her.

[10] In [late] 2014 [Ms Stearne] and [Hemara] moved to New Zealand. [Mr Swinburne] was to join them, but their final separation occurred [late] 2015. It was not

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<sup>3</sup> *LDP v KLP* [2012] NZFLR 278 (HC) at [37].

until [mid] 2016 that he was able to come back to New Zealand to live. [Mr Swinburne]’s initial requests to visit with his young son at his Kohanga Reo were declined.

[11] By 6 July 2016 they had agreed on an interim parenting plan with contact by [Mr Swinburne] to be twice weekly on Tuesdays and Thursdays for three hours at [Hemara]’s Kohanga. Contact was to be “*between [Mr Swinburne] and [Hemara] only*”.

[12] There were issues with contact over December/January that year. [Mr Swinburne] moved to [location 2] to spend time with [Paiwa] who was then [under 15]. An arrangement between the parties in [early] 2017 for [Mr Swinburne] to see [Hemara] at Kohunga, with some additional Skype contact, broke down. Both parents blame each other for that breakdown. [Mr Swinburne] next tried to see [Hemara] at Kohanga on 31 May 2017. He was told that [Ms Stearne] had removed him from Kohanga a week or two prior. He had not been consulted or advised.

[13] On 23 June 2017 [Mr Swinburne] applied without notice for orders under s 46R of the Care of Children Act 2004 (the Act) and a parenting order under s 48. Ms Stenhouse-White was appointed as lawyer for [Hemara]. [Ms Stearne] was planning to move to [location 1] with [Hemara] while [Mr Swinburne] was planning to relocate to [location 2].

[14] [Ms Stearne] was expressing frustration at what she saw as a lack of commitment and consistency on [Mr Swinburne]’s part. She emphasised [Hemara]’s need for stability. She was opposed to overnight contact believing [Mr Swinburne] had yet to establish a relationship with his son.

[15] [Ms Stearne] proposed that [Mr Swinburne] commence regular contact with [Hemara] at a new Kohanga.<sup>4</sup> She claimed [Mr Swinburne]’s focus was on himself, not on [Hemara]’s interests. She expressed frustration at what she viewed as selfish attempts to prevent her relocating to [location 1].

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<sup>4</sup> It does not appear that [Ms Stearne] had consulted with [Mr Swinburne] prior to arranging this change of Kohanga for [Hemara] either.

[16] She said her move to [location 1] was motivated by affordability of housing and by the proximity of whanau and friends to [location 1]. She emphasised the importance of her whenua tupuna in [location 3], and [Hemara]'s close relationship to his maternal whanau, hapu and iwi.<sup>5</sup> She was less supportive of [Hemara]'s relationships with his paternal whanau.<sup>6</sup>

### **Overnight Contact**

[17] A round table conference was convened on 11 August 2017 and an agreement was reached for initial visits at Kohunga to lead to fortnightly visits, with [Hemara] seeing his father in the [location 4] area. After a further round table in November 2017 it was agreed overnight contact would start in January 2018. Contact was every third weekend from Saturday at 1.00 pm to Sunday at 12.00 pm as well weekly Facebook messenger contact. The agreement specifically provided, “[*Mr Swinburne*]’s son [*Paiwa*] can attend contact between [*Mr Swinburne*] and [*Hemara*] by agreement”.

[18] A further memorandum of consent, filed on 23 March 2018, increased that contact by only 2 hours. Contact was to be based at the home or bach of [Steve Hooker].<sup>7</sup> The contact arrangements were to be reviewed in November 2018 at another round table meeting which “*will be to finalise care and contact arrangements (to include special days, holidays, school age arrangements)*”.

[19] Over the following months [Mr Swinburne] travelled by bus from [location 2] for contact with [Hemara]. There was at least one occasion when [Mr Swinburne] arrived in [location 4] only to then find that [Hemara] was not to be made available for contact because he was apparently unwell. [Mr Swinburne]'s belief was that [Ms Stearne] had been difficult, reticent or obstructive over the contact issue and that she would have preferred it if he were not involved. [Ms Stearne] denied being obstructive.

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<sup>5</sup> [Hemara] was named after a [rangitira] and the move would take them closer to [Ms Stearne]'s whenua at [location 3].

<sup>6</sup> She said, “[*Mr Swinburne*] is also Māori but with his parents living in Australia and with [*Mr Swinburne*] largely absent in his life, he has not fostered [*Hemara*]’s identity and connection to the other side of his whanau in that same way.”

<sup>7</sup> Mr [Hooker] is a long-time friend of [Mr Swinburne], also known to [Ms Stearne] – [Hemara] calls him “Uncle [Steve]”.

[20] There were no other significant issues with contact over the next several months. On one Friday night [Ms Stearne] agreed to allow [Mr Swinburne] additional contact with [Hemara] and picked up [Mr Swinburne] from the bus station to deliver him to Mr [Hooker]'s house in [location 4]. [Hemara] and [Mr Swinburne] were able to pick up a kai on the way. She said, "*I thought things were progressing quite well that year*".

[21] At Mr [Hooker]'s house [Hemara] and [Mr Swinburne] slept together in a Queen bed which was located on a mezzanine floor above a laundry area. The bedroom was adjacent to the bedroom where Mr [Hooker] slept. [Hemara] and [Mr Swinburne] wore pyjamas in bed. Mr [Hooker]'s evidence was that he and his family, his partner, a daughter then aged ten and a son then aged eight, were usually at home.

[22] [Mr Swinburne] and [Hemara] usually showered together in the only downstairs bathroom which was used by the entire [Hooker] family. His said that was to ensure [Hemara] washed himself properly because of his young age, and out of a concern not to inconvenience the busy household. He said that on occasions he assisted [Hemara] in washing his penis or showed him how to do it. He had assisted him in toileting on occasions. He otherwise denied ever having touched [Hemara]'s penis. He denied talking about "*whether boys touch their penis or not*", other than in the context of toileting. He denied that there had ever been any inappropriate touching.

[23] [Mr Swinburne]'s last overnight contact with [Hemara] occurred on the weekend of [date deleted] 2018. On 26 November 2018 [Ms Stearne] filed a without notice application for parenting orders seeking an order that contact between [Hemara] and [Mr Swinburne] be suspended until further order of the Court.

### **The Allegations**

[24] In her affidavit in support of that application she said that several days after [Hemara]'s last visit with [Mr Swinburne] he told her that his ure hurt when he went to the toilet. He had been grabbing it for the past four weeks. The following week on about 19 November [Hemara] said to her "*Mum, its sore when I mimi (urinate)*" and that he thought he should go to the doctors.

[25] On Thursday 22 November 2018 she and [Hemara] were attending a wananga at [location 1] and [Hemara] came to her distressed because he had soiled himself. This was unusual as [Hemara] had long been toilet trained.

[26] Once [Hemara] was cleaned up, they had stopped at a local takeaway store and while they were waiting in the car for the food [Hemara] was grabbing his ure. She told him to leave it alone and he said “[Papa Victor] touches my ure. He squeezes it hard”. He told her that “he had asked [Papa Victor] to stop but [Papa Victor] said he wants to squeeze it”. He said “[Papa Victor] wants to find me and touch my ure again. That’s why I don’t like going to Uncle [Steve]’s house”.

[27] [Hemara] told her that he had “pushed [Victor] outside” and had locked him out and yelled “no more squeezing my ure”. She asked whether it happened at bath time. [Hemara] responded adamantly and said “no he squeezes my ure and its sore. I told him to stop that but he don’t because he wants it”.

[28] The following day [Ms Stearne] took [Hemara] to a [clinic] where he was examined. The doctor could find nothing medically wrong with the exception of two small dots which might have been thrush. [Hemara] was prescribed a cream and evidently the pain subsequently faded.

[29] [Ms Stearne] told the nurse or doctor what had happened. The doctor made a Report of Concern to Oranga Tamariki by way of a telephone call. [Ms Stearne] could not recall whether [Hemara] was present when the events were discussed with the doctor and nurse, but she thought he might have been.

[30] She was subsequently contacted by Oranga Tamariki who asked her a number of questions about [Hemara]’s history.

### **Child Focused Interviews**

[31] On 5 December 2018 two Oranga Tamariki social workers, Ms [Knight] and Ms [Stanley], conducted a Child Focused Interview (CFI) with [Hemara] at his Kohanga Reo in [location 1]. Neither Ms [Knight] nor Ms [Stanley] gave evidence.

The only account of their observations was contained in a report provided by Oranga Tamariki under s 132 of the Act 2004 dated 16 October 2019.<sup>8</sup>

[32] They first met with the Kaiako at Kohanga Reo. They were told when [Hemara] started in July 2018 he had initially been very angry and quick to react, but he soon settled with no behavioural issues. Over the last three weeks he had reverted to becoming easily aggressive again. He had been telling other children to pull their pants down and had tried to get them to take their clothes off while they were playing. The Kohanga had tried to modify this behaviour. They said, “*usually he is a delight and an awesome little boy*”.

[33] A CFI was completed with [Hemara] at Kohanga with his Kaiako present. They used a picture book with pictures of the human body. They noted that [Hemara] did not appear to be able to identify private areas or “not safe” areas but was inquisitive about muscles, bones and the brain. He asked, “*why did the man in the picture take his clothes off?*” He did not make any disclosures or “*lead into conversation that raised concerns for his continued wellbeing*”.

[34] On 12 December 2018 Ms [Knight] and Ms [Stanley] visited [Hemara] at his home for a further CFI. Because [Hemara] is fluent in both English and Te Reo, his Kaiako was again present. They noted that in his home environment he appeared to be more relaxed in his engagement and conversation. Once again, he did not talk of anything that suggested that there might be a concern for him being in [Mr Swinburne]’s care. They reported he did not want to engage in conversations about “*good and bad touching*” and appeared to “*avoid discussion about body parts, as he ignored the questions and stopped engaging with Ms [Knight]*”. When asked if there was anything he did not like at [Papa Victor]’s, [Hemara] nodded his head but did not comment further. When pressed he stopped engaging and then said “*I don’t like it when he ([Mr Swinburne]) buys me girls’ toys. I only like boys’ toys*”.

[35] Despite the lack of disclosure by [Hemara] in either CFI, on 13 December 2018 he was referred to the Specialist Services Unit for an Extended Forensic Assessment

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<sup>8</sup> The s 132 report was written by Ms [Rumsey], not the interviewers.



(EFA) with the consent of [Ms Stearne].<sup>9</sup> That EFA was completed on 21 December 2019 by a psychologist, Ms [Truman], who swore an affidavit and was cross examined.

[36] There was no evidence from [Hemara]’s Kohanga Reo or Kaiako. Any information as to [Hemara]’s behaviour at Kohanga came only in the form of matters stated in the s 132 report by its author Ms [Rumsey]. That was mainly acquired by Ms [Knight] and Ms [Stanley] rather than by Ms [Rumsey]. In cross examination Ms [Rumsey] confirmed that there were no records, diary notes of the like to corroborate the observations of Kohanga Reo. She said that the decision to refer the matter for an EFA arose because “*avoidance was confirmed*” and because of the disclosure that had been made to [Ms Stearne] and the behaviour observed at Kohanga.

### **Extended Forensic Assessment**

[37] Ms [Truman] is a registered psychologist with significant relevant experience including some work as an evidential interviewer of children for Child Youth and Family. She met with [Hemara] on 21 December 2018 for the EFA.

[38] On 20 December she had met with [Ms Stearne] at Oranga Tamariki’s offices in [location 1] and obtained the relevant history, including the disclosures [Hemara] had made in November. She recorded what she was told by [Ms Stearne] as including:

[Papa Victor] touches my ure and squeezes it very hard and I ask him to stop it. He is disgusting.

[Papa Victor] says he wants to find me and touch my ure. [Papa Victor] is not nice to me, only you ([Ms Stearne]) are nice to me. I don’t get happy, I get sad, I take his phone and I want to call you. I push [Papa Victor] outside, lock the door, no more squeezing my ure.

[39] [Ms Stearne] told her that on 8 December 2019 [Hemara] had said, “[*Papa Victor*] touches my ure all the time and tells me to touch mine”.

[40] Ms [Truman] said [Hemara] was expressive during the interview and receptive. His language was age appropriate. She asked him at the outset if he knew why he was there. He said, “*Yes about [Papa Victor] touching my ure and my raho*”. When she

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<sup>9</sup> [Mr Swinburne] was not consulted.

asked him to show on his body where the ure and raho were he pointed to his penis. He went on to say, without prompting, “*He touches it and it hurts, I cry. He wants me to go with him all the time*”. She recorded that:

He said it happens in bed. He sleeps in the same bed as his father (upstairs in the bedroom). He wears short pyjama pants and his father too.

[41] [Hemara] told her that he did not want to go and see his Papa “*because he is naughty, and it hurts*”. Ms [Truman] asked him what Daddy should be told and [Hemara] said, “*Don’t touch my ure. Stop being like that. Not touch my ure because it hurts and hurts my feelings*”. [Hemara] told her that [Mr Swinburne] had said that “*all boys touch their penis and that it’s allowed to touch the penis*”. [Hemara] said, “*I said to Papa: “no”.*”

[42] In cross examination Ms [Truman] said that it was not an unusual response for [Hemara] to immediately talk openly to her about why he was being interviewed, notwithstanding the fact that he had made no disclosures during either of the two CFI’s. She did not think that [Hemara] having soiled himself prior to the disclosures to [Ms Stearne] was necessarily “*a crucial link*” to the alleged abuse given that it was a one-off incident. She described the behavioural changes observed at Kohanga, including [Hemara] trying to get other children to pull their pants down, as being “*somewhere in the range of concerning*”, although that was not information she was aware of at the time of the interview. She did not hold a concern that [Ms Stearne] was trying to influence, or had influenced [Hemara]. When she was asked a series of questions around resumption of contact by [Mr Swinburne] she said:

I think the recommendation would be, for me, supervised access but that would be just my recommendation. It is not my belief but that’s – as a psychologist, I would say.

[43] She would not necessarily recommend counselling for [Hemara] but rather just a brief intervention with the parent and child around keeping safe. She said, “*children need to move on*”. She did not regard the fact that [Hemara] now wanted to see [Mr Swinburne] as particularly significant, noting from her experience working in child abuse that there were very few cases where children did not want to maintain a relationship with their alleged abuser. Following the EFA, [Hemara] was referred for

an Evidential Video Interview (EVI) which was scheduled for the morning of Monday 24 December.

### **Evidential Video Interview**

[44] The EVI with [Hemara] occurred on Christmas Eve, 24 December 2018. [Hemara] was interviewed by [name deleted] at Oranga Tamariki's [location 1] offices for approximately 36 minutes. During the interview [Hemara] was somewhat distractible. He occupied himself with playdough which at one point the interviewer removed, to regain his focus.

[45] [Hemara] was told that the most important thing was that "*you tell the truth and don't tell any lies*". When asked "*Do you promise to tell the truth today while we are talking?*" He said, "*Um, um, um, I don't know*". After a series of further questions, he was again asked "*So do you promise to tell the truth today while we are talking?*" He again, responded "*Mmm, I don't know*". The interviewer nonetheless proceeded with some introductory questions, asking [Hemara] to tell her about something fun that he had done lately.

[46] [Hemara] talked about a visit to the park, his friends, and the fact that he wanted or needed a helmet. He was then asked, "*What have you really come to talk about today?*" Some minutes of follow-up questions passed without [Hemara] relevantly responding before the question was asked again. [Hemara] replied "*To, to, [Papa Victor] touched my raho ... my ure, my raho*". [Hemara] explained that [Papa Victor] was his dad and when asked about the incident further said, "*[Papa Victor] not touching my raho. [Papa Victor] not touching my raho*".

[47] He was asked "*Alright, so what else can you tell me about [Papa Victor] doing that?*" and answered, "*He gives me food*". [Hemara] needed some prompting, "*What did he touch it with?*" before he answered, "*With, ah, with his hands*".

[48] He said it happened at Uncle [Steve]'s house (a reference to Mr [Hooker]). When asked if anyone saw [Papa Victor] do it he said:

Mm, um, I don't – um, he did see that, but, he doesn't, he doesn't, he doesn't touch it anymore. I mean, not all the time, just sometimes ... but he's not allowed to.

[49] When asked where it happened he said, “*At Uncle [Steve]’s in a room with toys and guns*”. He was asked where his clothes were when [Papa Victor] touched his raho/ure and said:

My clothes, my clothes, um, he touched my jacket, he touched my, um, shorts ... and my pants ... and my shorts.

[50] The interviewed asked, “*Mm ... what happened to your pants and your shorts when he touched your ure?*?”. [Hemara] replied:

Um, it was, it was – oh, he touches my ure ... ‘cause he wants me to go toilet.

[51] Asked what happened next, [Hemara] said:

Um, he wants me to touch his, his, his, um I don't know ... I don't know what you're talking.

[52] When asked for confirmation that it had happened upstairs or downstairs [Hemara] said that the interviewer had got it wrong and that it happened:

Um ah downstairs ... but, ah, the other stairs, yeah, Uncle [Steve]’s stairs, it does happens at Uncle [Steve]’s stairs.

[53] When asked what he had meant when he said that [Papa Victor] touched his raho/ure because he wanted [Hemara] to go toilet, [Hemara] replied:

Because he, he, because I might piss my pants and my shorts.

[54] Asked whether his raho/ure was touched “... *on top of your shorts and pants, or inside your shorts and pants or something else?*” [Hemara] said:

Um, um, the outside ... he touched my ure the outside of my shorts.

[55] Later when asked what his ure was used for he said, “*Um, it's for – to go mimi ... and for, and washing it*” and when asked who usually washed his ure he said, “*Oh, [Papa Victor] has a shower, he always washes it*”.

[56] Questioned repeatedly about how [Papa Victor] washed his ure in the shower and whether he touched it with his hand and [Hemara] said “*with soap with – on water to wash it out*”, and when asked if he was washed anywhere else, he said, “*Um, at the swimming pools. Um um um um I don’t know*”.

[57] After a break in the interview [Hemara] said, “*Um, I think that’s enough questions.*”

[58] [Hemara] was asked, “*How old were you when that happened?*” he replied, “*Um, I was, um, three when that happened.*” He was asked if it ever happened when he was four but was adamant that he was three. [Hemara], when prompted, said it had happened more than once. He was asked, “*Um, and when he wanted you to touch his, did that happen just once or more than once?*” and replied, “*Um, more than once.*”

[59] The interviewer asked [Hemara] “*What did he want you to touch it with?*” [Hemara] answered, “*Um, with a, um, gun ... with a gun*”. [Hemara] was asked where he slept and said it was upstairs in the bed with [Papa Victor]. He was asked whether any touching of his raho/ure happened while he was sleeping upstairs with [Papa Victor], and replied, “*Um, I don’t know*”.

### **Subsequent Events**

[60] [Ms Stearne] and [Hemara] met with Ms [Rumsey] on 7 March 2019. [Ms Stearne] was advised about making a sensitive claim through ACC. [Ms Stearne] told Ms [Rumsey] that [Hemara] had not seen [Mr Swinburne] since the disclosures were made and she would ensure that any contact that [Hemara] had in the future with [Mr Swinburne] would be supervised. [Ms Stearne] was told that the file was being closed because the investigation was complete and that [Hemara] was in a safe place, not needing any extra support.

[61] [Mr Swinburne] was interviewed by the police on 16 May 2019, which was recorded in writing and signed by him. When asked about the times when he had touched [Hemara]’s penis he said, “*Washing him in the shower. That’s the only times.*” Asked if he had squeezed [Hemara]’s penis he said, “*No. I would do it in a way that*

*a normal, caring father would*". He denied that he had ever asked [Hemara] to touch his penis.

[62] The interviewing constable summarised what [Ms Stearne] and [Hemara] had said. Challenged as to why [Ms Stearne] and [Hemara] would have said these things had happened if they had not, [Mr Swinburne]'s response was, "*Because I suspect that he's being coached to try to sabotage mine and [Hemara]'s relationship. Coached by ([Ms Stearne])*". He was asked if there was anything else he wanted to say and he replied:

Yes. I have a [teenage] son to another woman whom I have a great relationship with. She is willing to give a statement to support the truth that I am a good dad and there have never been any allegations of this sort at all. I've also been a [job deleted] for about 10 years and I've never once had any allegations against me. I'm innocent of these allegations.

## **The Law**

[63] My first task is to determine whether I am satisfied to the relevant standard of proof, either that sexual abuse did occur or that sexual abuse did not occur. In making that decision I am required to apply the civil standard of proof commensurate with the gravity of the allegation.<sup>10</sup> In *S v S*, Gallen J, writing the judgment for the Court of Appeal, said:<sup>11</sup>

... The standard would be little, if any less than proof beyond reasonable doubt.

[64] Before making a finding that the allegations of sexual abuse were groundless I would need to be "*completely satisfied*" that sexual abuse had not occurred.<sup>12</sup>

[65] However, if no positive finding is possible, if I cannot be satisfied to the required standard that the abuse occurred or that the allegations are groundless, then "*the important question is whether or not the situation is such that a child would be*

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<sup>10</sup> *M v Y* [1994] 1 NZLR 527 (CA) at 533.

<sup>11</sup> *S v S* [1994] 1 NZLR 540 (CA) at 546.

<sup>12</sup> *S v S*, above n 12, at 546.

*exposed to an unacceptable risk if (unsupervised contact) were permitted.*"<sup>13</sup> That involves an assessment of risk and the question for the Court is whether there is:<sup>14</sup>

... actual evidence which at the very least gives rise to the conclusion that behaviour may have occurred or may occur which has had or could have deleterious effects on the child concerned. It must be more than mere conjecture and need not go as far as proof which would justify a conviction. ... In considering the whole matter as the Judge points out, it is necessary to bear in mind the serious consequences which can occur to a child if he or she is subjected to behaviour which is inappropriate in this area.

[66] I am guided by the core principles contained in the Act, in particular ss 4, 5 and 6 which include the following:

**4 Child's welfare and best interests to be paramount**

- (1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—
  - (a) in the administration and application of this Act, for example, in proceedings under this Act; and
  - (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
- (2) Any person considering the welfare and best interests of a child in his or her particular circumstances—
  - (a) must take into account—
    - (i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and
    - (ii) the principles in section 5; and
  - (b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests.
- ...
- (4) This section does not—
  - ...
  - (b) prevent any person from taking into account other matters relevant to the child's welfare and best interests.

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<sup>13</sup> *S v S*, above n 12, at 546.

<sup>14</sup> *S v S*, above n 12, at 546.

## 5 Principles relating to child's welfare and best interests

The principles relating to a child's welfare and best interests are that—

- (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:
- (b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:
- (d) a child should have continuity in his or her care, development, and upbringing:
- (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapū, or iwi should be preserved and strengthened:
- (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

## 6 Child's views

- (1) This subsection applies to proceedings involving—
  - (a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or
  - ...
- (2) In proceedings to which subsection (1) applies,—
  - (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
  - (b) any views the child expresses (either directly or through a representative) must be taken into account.

[67] [Hemara]'s welfare and best interest are my first and paramount considerations. I note that the Court of Appeal confirmed in *Kacem v Bashir* that I should consider all of the six principles in s 5 which are relevant, but the fact that the legislature has stated in s 5(a) that “*a child's safety **must** be protected and in particular*



*the child must be protected from all forms of violence (emphasis added)*” is undoubtedly significant and “ [s 5(a)] if relevant will generally carry decisive weight in the factual assessment”.<sup>15</sup>

[68] If I find that sexual abuse has occurred, or if I find that it cannot be proven to the relevant standard that sexual abuse has not occurred, then I will be necessarily engaged in a safety assessment before I order any contact, or any unsupervised contact. I will be aided in that safety assessment by the approach recommended in *Ness v Ness* where His Honour Judge Coyle noted that the now repealed provisions of s 61 of the Act were in effect the type of safety assessment that was envisaged by the Court of Appeal in *M v Y*,<sup>16</sup> namely considering:

- (a) The nature and seriousness of the violence;
- (b) How recently the violence occurred;
- (c) The frequency of the violence;
- (d) The likelihood of further violence occurring;
- (e) The physical and emotional harm caused by the violence;
- (f) Whether the other party considers the child will be safe while the violent party has day to day care of, or unsupervised contact with, the child;
- (g) Whether the other party consents to the violent party having day to day care of, or unsupervised contact with, the child;
- (h) Any views expressed by the child;
- (i) Any steps taken by the violent parent to prevent further violence occurring.<sup>17</sup>

[69] In conducting that risk assessment, I may be led to the conclusion that there should be no contact between [Hemara] and [Mr Swinburne], or to the conclusion there should only be access that is monitored or supervised or otherwise controlled or limited. This is an important and distinct task from the task of assessing whether the

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<sup>15</sup> *Kacem v Bashir* [2010] NZSC 112; [2011] 2 NZLR 1 at [22]. Note the original reference in that case were to s 5(c), the predecessor to s 5(a) which was essentially identical save for the order of appearance in s 5.

<sup>16</sup> *Ness v Ness* [2016] NZFC 2078; *M v Y* [1994] 1 NZLR 527 (CA).

<sup>17</sup> See also *A v X* [2005] 1 NZLR 123 (HC) [also cites as *Blom v Mackay* (2004) 23 FRNZ 644].

alleged abuse has occurred and although to some extent those two tasks may begin to merge, the distinction is “*important and must not be lost sight of*.”<sup>18</sup>

[70] Protecting the child’s paramount interests and achieving a balance between the risk of detriment of the child from sexual abuse and the benefit to the child of parental contact is a difficult task if proper balance is to be achieved, “*The test is best expressed by saying that a Court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse*”.<sup>19</sup>

[71] The same considerations apply if I find that contact between [Hemara] and [Mr Swinburne] would expose [Hemara] to an unacceptable risk of significant harm such as psychological harm in circumstances where [Hemara] believes that [Mr Swinburne] has sexually abused him. I also need to be alert of the risk of “*hostility towards the non-custodian parent*” which might impair [Hemara]’s ability to maintain a fruitful relationship with [Mr Swinburne].<sup>20</sup>

## **Analysis and Discussion of the Issues**

### ***Issue 1 – Can I be satisfied to the required standard that sexual abuse occurred?***

[72] In analysing the evidence and applying the standard of proof set out above I note there is no physical evidence that [Mr Swinburne] sexually abused [Hemara] and no first-hand witnesses confirm that sexual abuse either occurred or is likely to have occurred. However, that is not remarkable.

[73] In his evidence and submissions, [Mr Swinburne] contended a belief that [Ms Stearne] had either “*brainwashed/influenced*” [Hemara], or at least that [Hemara] had been influenced by [Ms Stearne]. He suggested that [Hemara] had been “*placed in a position of being told to say something that didn’t happen*”. He pointed out a number of inconsistencies in [Hemara]’s disclosure, some of which he said were “*strange*”.<sup>21</sup> He said he was:

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<sup>18</sup> *M v Y*, above n 10, at 534.

<sup>19</sup> *M v M* (1988) 166 CLR 69 at 77,081 – cited with approval in *M v Y* at 534.

<sup>20</sup> *M v Y*, above n 10, at 534.

<sup>21</sup> For example, “Touch it with a gun” – the statement that [Hemara] made that he had locked his father out.

Extremely concerned about the effect this has had and will have on [Hemara], knowing that this didn't actually occur but given the amount of input ([Ms Stearne]) has had he probably now believes it did happen.

[74] On balance of probabilities I do not find that [Ms Stearne] has deliberately influenced [Hemara]. I certainly do not find that she has told him to say something that she knows to be untrue.

[75] When she was questioned in Court she described in detail the initial disclosures that [Hemara] made to her while they were waiting for their takeaways in [location deleted]. She described [Hemara] repeating himself for a very long time saying, "*it was a long time for him to be talking, they had to even bring out the takeaways to us.*" Her detailed recall of the discussion and the level of manifest emotion and concern that she displayed left me with little doubt that she was describing a discussion that had occurred. However, some of the detail of what [Hemara] said to her may not have been accurately recalled.

[76] It is possible some of [Hemara]'s statements in either the EFA or EVI process were influenced by things that he heard or that were said in his presence before those interviews. For example, [Ms Stearne] was unable to recall whether or not [Hemara] had been in the room when the doctor was informed of the details of [Ms Stearne]'s concerns and [Hemara]'s disclosures at the [clinic] appointment on 23 November 2018.

[77] [Hemara] made no disclosures and expressed no concerns about [Mr Swinburne] during either of the two CFI interviews. Regrettably I did not have the benefit of hearing from either of the interviewees nor of reading any first-hand accounts or notes that may have been created following their interviews. While the word "*avoidant*" was used to describe [Hemara]'s behaviour in the interviews it is not clear that [Hemara] thought he had something significant to disclose which he was not talking about.

[78] The contrast between [Hemara]'s evident lack of concern on those two occasions and the immediate statement he made at the start of the EFA only nine days later that [Mr Swinburne] had touched his ure/raho was not adequately explained. It

may have been a result of [Hemara]'s involvement in discussions in the interim. A full month passed between [Hemara]'s disclosure to his mother on 22 November and the EFA. However, I do not mean to suggest that [Ms Stearne] had deliberately influenced [Hemara], nor that she had set out to deliberately "remind him" of things that he had said to her.

### **Fabrication Allegation**

[79] I do not accept one of [Mr Swinburne]'s principal theses, which was that [Ms Stearne] was motivated by a desire to restrict or end [Mr Swinburne]'s contact with [Hemara], or wished simply to remove [Mr Swinburne] from her life and fabricated [Hemara]'s disclosures to her and/or deliberately influenced him.

[80] In support of that claim [Mr Swinburne] pointed to the history of contact between he and [Hemara] since he had returned to New Zealand and to occasions when [Ms Stearne] had either not allowed contact to occur or had made decisions or changes without consulting [Mr Swinburne] in breach of her obligations as a guardian.

[81] It is a matter of some concern to me that [Ms Stearne]'s primary focus is on [Hemara]'s relationship with her and with his maternal whanau. However, given that [Mr Swinburne] had been absent from [Hemara]'s life for a time before he returned from Australia it was understandable that [Ms Stearne] had initially wanted to ensure that contact with [Mr Swinburne] was reimplemented in a staged manner. She at times acted out of frustration at what she perceived to be inconsistent contact on [Mr Swinburne]'s part. She felt there was a lack of commitment to contact and a lack of concern for [Hemara]'s need for certainty.

[82] However, the overall trend across the two years and six months between [Mr Swinburne]'s return to New Zealand in [mid] 2016, and contact ceasing altogether in November 2018, was one of [Ms Stearne] gradually conceding increased contact, including overnight contact. There were occasions when she acted in ways that would have been frustrating and seen as obstructive by [Mr Swinburne]. There were also occasions when she acted in helpful ways to facilitate contact or better contact.

[83] A suggestion by [Mr Swinburne] that she was motivated by his rejection of her desire to reinitiate the relationship is emphatically denied by [Ms Stearne]. The only evidence in support of that thesis was a single email which was at best equivocal in intent and meaning. Nothing particular happened to motivate [Ms Stearne] to end contact prior to her without notice application on 29 November 2018. On balance of probabilities I do not find any ill-motive or ill-will on [Ms Stearne]'s part prior to [Hemara]'s disclosures.

[84] However, it does not mean that I am satisfied to the required standard that the events [Hemara] described to mother in the EFA and EVI processes had actually occurred as he perceived them or as he reported them.

[85] There is a real possibility that [Hemara] may have misinterpreted events such as [Mr Swinburne] assisting him with bathing or toileting. [Hemara]'s accounts might otherwise cross the sometimes fragile line between reality and perception that exists for four year old children. I do not mean to suggest for a moment that [Hemara] was deliberately lying. However, there were some inconsistencies and improbabilities, including the following:

- (a) [Hemara]'s account of when, where and how any touching had happened varied in material ways from interview to interview, or even on occasions within each interview.
- (b) [Hemara] said that [Mr Swinburne] had touched him when showering/washing. He said that [Mr Swinburne] had touched him in the process of toileting or being concerned about [Hemara]'s toileting. In the evidential interview [Hemara] seemed to be saying that [Mr Swinburne] touched the outside of his shorts or on top of his shorts and pants rather than inside.
- (c) Some of [Hemara]'s statements were simply implausible. Although he said (with some encouragement) that [Mr Swinburne] had touched his ure/raho with his ([Mr Swinburne]s) hand (albeit in the context of toileting or showering), he did seem to be influenced by what was

immediately in front of him. During the EVI process while playing with the play dough, at once point [Hemara] remarked that what he had made looked like a watergun. The interviewer then asked [Hemara] “*and when he wanted you to touch his, ... what did he want you to touch it with?*” and [Hemara] replied, “*um, with a, um, gun.*” That was a statement he repeated. It clearly had not happened.

- (d) In the EVI the interviewer seemed to be trying to have [Hemara] confirm that [Mr Swinburne] had asked [Hemara] to touch [Mr Swinburne]’s penis, but [Hemara]’s responses to that line of questioning were at best equivocal. I am not satisfied that [Hemara] either said or believed that [Mr Swinburne] was asking him to touch [Mr Swinburne]’s penis.
- (e) [Hemara] told [Ms Stearne] that he had pushed [Mr Swinburne] outside and had locked [Mr Swinburne] out. [Mr Swinburne] denied that had happened and said there were no relevant locks inside the home. There is no door to the mezzanine bedroom they used. Mr [Hooker] confirmed that the only lock in the house was on the bathroom door, and that was broken. [Ms Stearne] said [Hemara] described with some clarity and distress pushing [Mr Swinburne] out and locking him out. That is unlikely to have occurred.
- (f) The thrust of Mr [Hooker]’s evidence is that his household is a busy one and that he was almost invariably in the home, usually in close proximity to [Hemara] and [Mr Swinburne] when contact occurred. His bedroom is within hearing of the mezzanine bedroom [Hemara] and [Mr Swinburne] occupied. That bedroom is exposed to a laundry area below often used by the family. He did not hear or witness any of the events described, certainly not any event where [Hemara] locked [Mr Swinburne] out or yelled “*no more squeezing my ure*”.

[86] The fact that the police did not lay charges or otherwise pursue the matter further was urged on me by [Mr Swinburne] as highly relevant. They would have been

operating under a different standard of proof and it may well have been a concern to them that the interviewer conducting the EVI did not secure a clear promise from [Hemara] that he would tell the truth nor a clear acknowledgement that [Hemara] understood the difference between what was real and what was not real. I did not have the benefit of any evidence as to [Hemara]'s actual understanding nor about the hypothetical level of understanding that a four-year-old child in [Hemara]'s situation might possess.

[87] [Ms Stearne] gave evidence that there had been a change in [Hemara]'s behaviour prior to the disclosures and that he had been grabbing, squeezing and touching his ure and raho more frequently. Either that or the thrush that was evidently successfully treated with cream may have explained [Hemara]'s ure/raho being sore. I do not find the fact that [Hemara] said his ure/raho was sore indicates a likelihood that he was sexually abused by anyone.

[88] While there were apparently observations that [Hemara]'s behaviour had changed at Kohanga, as outlined above, I did not have the benefit of any direct evidence from the Kaiako, nor access to any notes or records. Nor did the psychologist Ms [Truman], nor the social worker who prepared the s 132 report, Ms [Rumsey].

[89] It is also a concern that there was no direct evidence from the social workers who conducted the two CFI processes. The changes in [Hemara]'s behaviour at kohunga leave me with some cause for concern but do not, in my view, amount to significant evidence making it more likely that [Hemara] was sexually abused by [Mr Swinburne].

[90] There is also the evidence of Ms [Haigh], [Paiwa]'s mother. [Ms Stearne] claimed that [Mr Swinburne] had showered with [Paiwa] while he was visiting with him in Australia and she had remarked on finding it odd given [Paiwa]'s age. [Mr Swinburne] denied that had occurred at all.

[91] Ms [Haigh]'s evidence was that having known [Mr Swinburne] for 17 years she had never had any concerns for the safety of her two sons nor had they ever

expressed any sort of news of any type of sexual misconduct or behaviour.<sup>22</sup> She was confident that her children would speak up and recorded that both of her sons loved spending time with [Mr Swinburne] and looked to him as a good father/stepfather.

[92] [Mr Swinburne]'s accounts have been consistent. In cross-examination his responses were appropriate and he appeared to be a credible and honest witness. He has denied any inappropriate touching. He expressed genuine concern at the prospect that his son might have been sexually abused.

[93] Overall on balance of probabilities, taking account of the gravity of the allegation, the evidence does not leave me satisfied, that sexual abuse occurred. I therefore cannot affirmatively conclude that [Mr Swinburne] did sexually abuse [Hemara] in any way.

***Issue 2 – Can I be satisfied to the required standard [Mr Swinburne] did not sexually abuse [Hemara]***

[94] I do not accept [Mr Swinburne]'s thesis that [Ms Stearne] deliberately influenced [Hemara] or fabricated the disclosures. I am on the other hand left with the real possibility that [Hemara] might be misinterpreting or misdescribing legitimate or innocent activities on [Mr Swinburne]'s part such as assisting him with washing or toileting.

[95] With the benefit of hindsight, [Mr Swinburne] may be reflecting on the wisdom of sharing a bed with [Hemara] and showering with [Hemara], but I do not find either occurred out of any ill motive, nor in order to facilitate sexual abuse. [Mr Swinburne]'s account when cross examined was credible. He was caring for [Hemara] in the busy household of a friend. Sharing a large bed with [Hemara] in the circumstances of that household, does not make the allegations more probable. He may have been unwise to consistently shower with [Hemara], but I do not find that his choice to do so, in the absence of any pre-existing concern, was sinister.

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<sup>22</sup> She had an older son, to whom [Mr Swinburne] had been a stepfather, who is now aged [under 20] years.



[96] [Mr Swinburne] placed significant weight upon the implausibilities in [Hemara]’s evidence such as the statement that he was asked to touch [Mr Swinburne]’s penis with a gun, or the claim that he had yelled at his father and pushed him outside. I was also urged to place considerable weight upon Mr [Hooker]’s constant presence in the household and find that there was an absence of opportunity for the alleged abuse.

[97] I find on balance of probabilities that [Hemara] did not believe his father had asked him to touch his ([Mr Swinburne]’s) penis. [Hemara] was asked leading questions in the EVI in an attempt to elicit a response on this issue. His replies were those of a confused young boy who appears uncertain about what he was responding to.<sup>23</sup>

[98] Apart from [Ms Stearne]’s belief in the accuracy and legitimacy of [Hemara]’s disclosure, there is some potentially corroborative evidence, including the observed changes in [Hemara]’s behaviour. However, I do have concerns about the variable level of engagement and “*disclosure*” that [Hemara] displayed during the several interviews that occurred between 23 November and 24 December 2018.

[99] I am also concerned that [Hemara] may have been present during discussions which might have reinforced a belief that his father had inappropriately touched him. Nonetheless there is evidence about the possibility or risk that abuse occurred, sufficient to leave me not “satisfied” that abuse did not occur.

### ***Issue 3 – Risk Assessment***

[100] Given those findings I now assess the risk to [Hemara] of any contact, and in particular any unsupervised contact with [Mr Swinburne].

[101] First, I need to address a procedural point which was raised by the parties at the commencement of the case. In a minute issued on 19 August 2019, Her Honour

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<sup>23</sup> There were other aspects of the EVI which were unsatisfactory. They included: the failure to obtain an acknowledgement from [Hemara] that he would tell the truth: The failure to have [Hemara] confirm that he would correct the interviewer if she was wrong: The leading questions which were asked of [Hemara].

Judge Pidwell noted at paragraph [4] that the Court would need to make findings in relation to the allegations and depending on those findings would need to consider whether parenting orders should issue immediately or whether further evidence would need to be filed in respect of final orders. She noted that the Court should make that determination in [Hemara]'s timeframes given that he was then five years old and had not seen [Mr Swinburne] for nine months at that point. She envisaged a one-day fixture would be needed to make those determinations and directed that a s 132 report be prepared as a matter of priority.

[102] Judge Pidwell specifically directed:

The fixture will only be to determine the allegations and the parties will be given the option of filing additional evidence, depending on the outcome of that hearing.

[103] It was therefore submitted by [Ms Stearne] at the start of the hearing, that I ought not to make any directions as to contact between [Hemara] and his father – that should await more evidence and a further hearing.

[104] However, by the time this matter came on for hearing some 19 months had passed since [Hemara] had last seen his father. That was partly due to the interruption of the Court's business due to Covid 19, and partly due to this case expanding from the envisaged one day to two days. [Hemara] had for some time been expressing a wish to see his father and any further delay would not meet the Court's obligation in s 4(2) of the Act to ensure that decisions affecting [Hemara] should be made and implemented within a timeframe that is appropriate to his sense of time. I therefore directed that the parties' submissions should include submissions on the options for supervision, should I either positively find that abuse had occurred, or should I find that there was a significant risk [Hemara] might have been abused. I also asked counsel to address what, if any, supports might be appropriate for either [Hemara] or his parents if contact were to be reinstated.

[105] It had been submitted to me by [Ms Stearne] that regardless of the outcome of this hearing I ought to direct that a s 133 report be obtained. I was concerned at likely substantial delays in obtaining a report and that a decision on contact needed to be made sooner than that. I directed that counsel should address in their closing

submissions whether a s 133 report should be obtained and if so, what the brief should be.

[106] Finally, [Ms Stearne] had asked that proceedings be transferred to [location 1]. That request seemed to be supported by lawyer for the child, but it was opposed by [Mr Swinburne], who lives in [location 2].

[107] It was submitted that although [Ms Stearne] had not been engaged with “conventional support mechanisms” she and [Hemara] had been receiving Tikanga Māori based support including using karakia and Rongoā Māori, which I was informed is a traditional healing system based on herbal remedies, physical therapies and spiritual healing carried out by a Tohunga, incorporating Oranga Tinana, Oranga Hinengaro and Oranga Wairua.<sup>24</sup> [Ms Stearne] has also accessed counselling services to the Ngati Hine Health Trust which continued to be available to her as does the option to attend the parenting course that the Trust provides. She is evidently satisfied with the level of support for [Hemara] to date.

[108] In terms of the s 5(a) Safety Assessment I need to be alert to the risks to [Hemara] both of physical abuse and if possible psychological harm. However, I will also not lose sight of the other s 5 factors which are discussed below.

[109] Adopting the approach suggested in *Ness v Ness* the factors that I need to consider are as follows:<sup>25</sup>

- (a) The nature and seriousness of the alleged violence (in this case the alleged abuse):

Any form of sexual abuse is harmful and deplorable. It is essential that [Hemara] is protected from the risk of sexual abuse until it can be concluded that he is safe.

- (b) How recently the abuse has occurred:

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<sup>24</sup> Oranga Tinana is physical wellbeing, Oranga Hinengaro is emotional/psychological wellbeing and Oranga Wairua is spiritual wellbeing.

<sup>25</sup> *Ness v Ness*, above n 9.

Obviously there has been no abuse since contact was stopped in November 2018. [Hemara] in the evidential video insisted that the abuse had occurred when he was three, which would have been sometime prior to [early] 2018. The issue of [Hemara]'s sense of time and his ability to recall in detail events that had happened seven or eight months earlier was not addressed in the evidence, nor was there any explanation as to why there might have been such a significant gap between the events [Hemara] was recounting and his disclosure of those events. It was one of the few things in the EVI that [Hemara] was clear about, but that may simply indicate that from [Hemara]'s perspective the events had happened a considerable time before the interview. I am unable to conclude how recently [Hemara] believed any sexual abuse occurred.

(c) The frequency of the sexual abuse:

It was not possible to gain an impression from any of the evidence as to how often [Hemara] believed the events he was describing had occurred beyond "*more than once*".

(d) The likelihood of further sexual abuse occurring:

It is unlikely that there will be further abuse if contact is supervised. There is nothing to tell me [Mr Swinburne] has a proclivity to commit sexual abuse. [Mr Swinburne] had sought direction for the purpose of legal aid that funding be provided for an expert risk assessment, but that request was then regarded as premature.

(e) The physical or emotional harm caused to the child by the abuse:

There is a risk that significant latent harm might have been caused to [Hemara], but it is worth noting that by the time he was interviewed by Ms [Truman] he was already expressing the view that "*[Papa Victor] doesn't do that anymore.*" [Hemara] has not suffered any lasting physical harm and no evidence was led about any manifest psychological harm.

- (f) Whether the other party considers that the child will be safe with the abuser or consents to the abuser have day to day care or contact:

This is a troubling issue. [Ms Stearne] is understandably protective of [Hemara] and she is highly suspicious and mistrusting of [Mr Swinburne]. She had a relatively low level of trust in him from the time he returned to Australia and started to seek contact with [Hemara]. Any orders that I make will need to provide [Ms Stearne] with a level of assurance as to [Hemara]'s safety. However, [Ms Stearne] also needs to understand that it is important that she support and reassure [Hemara]. There is significant research and data to confirm that significant contact with both parents and the involvement of both parents and whanau in a young child's life is important for their long-term emotional wellbeing and security. The orders that I am going to make will ensure that [Hemara] is in a safe environment when he initially has contact with [Mr Swinburne]. [Hemara]'s immediate and long-term wellbeing will be better protected if he believes his mother supports any contact that he has with his father. I recognise that may be difficult for [Ms Stearne], but I am confident that her overriding concern for [Hemara]'s wellbeing can prevail given the genuine concern she has displayed for her son throughout this process.

- (g) Any views that the child expresses on the matter:

[Hemara] has been consistently saying for some time now that he wants to see his father again. As lawyer for the child says, his views must be given due regard.

- (h) Any steps taken by the abuser to prevent further abuse occurring:

I have not found that abuse did occur and as I have said [Mr Swinburne] emphatically denies the allegations. Until there is more data before the Court, whether in the form of a s 133 report or an expert safety assessment of some kind, supervision will not only protect [Hemara] from the possibility of any incidents occurring, but it may also be

viewed by [Mr Swinburne] as protecting him from the possibility of any further allegations being raised.

- (i) Any other matter that the Court considers relevant:

I set out below my views on the remaining principles in s 5 of the Act.

### **Section 5(b) to (f) of the Act**

[110] Section 5(b) stipulates that a child's care, development and upbringing should be primarily the responsibility of her parents and guardians. It is therefore important that [Mr Swinburne] play, or continue to play, an important role in [Hemara]'s life. It is unfortunate that there have been times when [Ms Stearne] has disregarded [Mr Swinburne]'s role as a guardian. On at least two occasions, possibly three, decisions were unilaterally made by her to change [Hemara]'s Kohanga Reo without any advice to [Mr Swinburne] let alone any consultation. Both [Mr Swinburne] and [Ms Stearne] need to understand that [Hemara] needs to have [Mr Swinburne] involved in his life. That is [Hemara]'s right, it is not a parental right. It does however impose obligations on both parents which need to be honoured. Directing that supervised contact commences as soon as possible seems best designed to meet the principle in s 5(b).

[111] Section 5(c) stipulates that a child's care, development and upbringing should be facilitated by ongoing consultation and cooperation between his parents and guardians. As stated above, this has at times been lacking in the past and it will be important that from now on the parties establish a constructive protocol for communication and consultation that is focused on [Hemara]'s needs rather than on any conflict between them.

[112] Section 5(d) emphasises that [Hemara] should have continuity in his care, development and upbringing. [Hemara] still recalls and evidently values the time he had with his father. It has been and should be a meaningful part of his life. On the other hand, for [Hemara]'s life to date, his mother has been his primary caregiver. The orders that I am going to make will not disturb that status quo.

[113] Section 5(e) assumes some significance in this case. The requirement that [Hemara] should continue to have a relationship with both of his parents and that his relationship with his whanau, hapu and iwi should be preserved and strengthened needs to be addressed.

[114] [Ms Stearne]'s desire to protect [Hemara] is commendable and her belief that she is in the best position to decide what is in [Hemara]'s best interests is understandable. However, she has understated the importance of [Mr Swinburne]'s role in [Hemara]'s life. [Hemara] seems to have been encouraged or taught by his mother to call his father "[Papa Victor]" rather than Papa, Dad or the like. She acknowledged that she had referred to her own father as Papa rather than "Papa [Jordan]", although she denied when questioned by lawyer for the child that she had told [Hemara] that he had to call his father [Papa Victor]. She was also aware that [Mr Swinburne] preferred that [Hemara] call him Dad rather than [Papa Victor]. She was asked by lawyer for child when [Hemara] had last talked about [Papa Victor] and she recounted that [Hemara] had said "*I don't have a Papa*". She said:

(I told him) "you know who your Papa is", because that is who, [Victor] is his biological father, and he actually said, "oh, Matua [name deleted]?" which is one of the whanaunga from the North, and I was like, "Oh, he's a Matua, but no, you know who your real Papa is.

[115] Describing [Hemara]'s father in that context as his "biological father", shows a tendency I observed of [Ms Stearne] to minimise the importance of [Mr Swinburne] in [Hemara]'s life. She did however acknowledge that [Hemara] had told her, after he had seen lawyer for the child, that he wanted to see [Papa Victor].

[116] That [Ms Stearne] is strongly aligned with her own whanau, hapu, iwi and whakapapa, is both right and understandable, but it is a concern that she minimises the importance of [Mr Swinburne]'s whanau in [Hemara]'s life. It was evident that she had not really thought about how [Hemara] might maintain a relationship of any kind with his brother [Paiwa]. When asked about [Hemara]'s paternal whanau she said there had been some contact with them in 2015 but she had not seen them since then. [Hemara] is now being called "[Hemara Stearne]" by her, using her surname when his legal name remains [Hemara Swinburne]. Again, she made that decision without consulting [Mr Swinburne].

[117] When [Ms Stearne] was asked whether she was concerned about the impact of her wish that [Hemara] not see his father again during his childhood she said:

But there are other father figures, I mean I'm not – I don't know, I'm not in a relationship now, but maybe I could be at some point, I don't know, and they might be a great father figure, but not his actual Dad yeah, I don't know what else to say.

[118] When asked about how he would get to know his whanau on his paternal side if he did not see his until he was 16, she said that she had not thought of that. Given that context, a resumption of [Hemara]'s relationship with his father without further delay is important.

[119] Finally, s 5(f) emphasises the importance of a child's identity including without limitation, his culture, language and religious denomination being preserved. I have no particular information about [Hemara]'s religion. I can be confident from [Ms Stearne]'s immersion in Te Ao Māori, and her whakapapa, that [Hemara]'s maternal culture and his language will be preserved. I do however have a concern that her focus will be solely on his maternal cultural identity and his association with his [location 3] tūrungawaewae. There is a risk he will be denied the opportunity to connect with his father's culture unless meaningful contact is restored.

### **Section 6 of the Act – [Hemara]'s views**

[120] [Hemara] has consistently expressed a desire to see his father again. [Ms Stearne] noted in March 2019 in Tauranga Tamariki that [Hemara] was settled and happy and had stopped talking about his worries about Dad and started talking about seeing Dad again saying, “[Papa Victor] doesn't do those things anymore.”

[121] [Hemara]'s lawyer met with him on 26 May 2020. [Hemara] said that he sees [Papa Victor] on Facetime and that is cool because he can do different faces.<sup>26</sup> He volunteered that he wanted to stay for one night with [Papa Victor], emphasising that he wanted to visit “*just for one night and then go home again tomorrow*”. He would “*just chill*” and maybe “*say hi*”.

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<sup>26</sup> It should be noted [Ms Stearne] said there had been no Facetime contact since November 2018.



[122] [Hemara] had asked to see the Judge and I had the pleasure of meeting him with his lawyer before the case commenced.<sup>27</sup> He is a charming and bright young boy, although he was understandably a little shy and reserved meeting me for the first time in a strange environment. I have recorded a separate minute dated 10 June 2020 which records our meeting, but one of the first things that [Hemara] said to me was “*I don’t want to talk*”, which I took to mean he did not want to talk to me about the allegations or the dispute between his parents.

[123] I explained what my role was and that I was seeing him because he had asked to see me, and I asked him if there was anything that he wanted to ask me or tell me. We talked about his school, some of his friends, his [pet] and I showed him around the Courtroom.

[124] There was nothing that [Hemara] said to me and nothing in his demeanour that caused me any concern.

### **Decision on Parenting Orders**

[125] Given [Hemara]’s age and sense of time, the length of time that has passed since he saw his father, and the importance of meaningful involvement by his father and paternal whanau in [Hemara]’s life, it is important that supervised contact commence as soon as possible.

[126] I am going to make an interim order allowing [Mr Swinburne] to have supervised contact with [Hemara]. I will record the details of that order below.

[127] I understand [Mr Swinburne]’s concerns about contact being supervised. He may be left with a sense of injustice given his denial of the allegations. He may be concerned about the inference people not aware of this decision might draw given the nature of the allegations and the requirement for supervision. However, I urge [Mr Swinburne] to put [Hemara]’s interest to the fore. [Hemara] needs to have contact with his father and the sooner that contact is reinstated the better.

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<sup>27</sup> Also present was an adult friend, [name deleted].

[128] To direct that contact be supervised in some way by Mr [Hooker] as is proposed by [Mr Swinburne] might simply expose both Mr [Hooker] and [Mr Swinburne] to a risk of further concerns being raised.

[129] When asked how he would have contact with [Hemara] from [location 2] [Mr Swinburne] indicated that he would travel by bus whether to [location 4] or [location 1]. He had some time to reflect on the possibility of supervised contact after being questioned by [Hemara]'s lawyer about it. He indicated he would be open to the prospect of supervised contact. As stated, for [Hemara]'s sake, both [Mr Swinburne] and [Ms Stearne] need to ensure that [Hemara] is properly supported, and that contact occurs as frequently as possible.

[130] When asked to comment whether "at a general level" supervised contact might lead to adverse psychological impacts, Ms [Truman]'s response was that contact with both parents is important at [Hemara]'s young age. When asked whether in her expert opinion she had any recommendations as to how this particular matter could be carefully handled she said that her recommendation would be supervised access.

[131] I encourage both parents to consider how [Hemara] can form and maintain a relationship with the balance of his paternal whanau including his grandparents and his brother [Paiwa]. It would be appropriate for [Mr Swinburne] to take [Paiwa] to some of later contact sessions and that will be permitted in the orders that I make.

[132] There should be no need for any contact between [Hemara] and other family members on [Mr Swinburne]'s side to be supervised in any way. I am not in a position to make any orders in the absence of any evidence as to how that contact might occur, but I will stipulate that reasonable contact should be allowed on appropriate conditions.

#### ***Issue 4 – Section 133 Report***

[133] [Hemara]'s lawyer submitted that a s 133 report will be essential to finally dispose of the proceedings. I agree with her that the brief for the report writer can only be formulated once the parties have the findings of this decision. The parties are

invited to make submissions on the possible brief for the report writer. I note [Hemara]'s young age and the fact that he did not want to engage with the issues in this case, at least with me. I nonetheless ask that Ms Stenhouse-White consider whether consultation with [Hemara] is appropriate.<sup>28</sup> There was otherwise consensus that a s 133 report will be of assistance.

[134] As for other counselling and support that might be offered to either [Hemara] or his parents, given Ms [Truman]'s evidence on this subject I am content to leave decisions as to any support that [Hemara] might need, whether through the ACC Sensitive Claims process or otherwise, to [Hemara]'s parents, particularly [Ms Stearne].

### ***Issue 5 – Transfer of Proceedings***

[135] [Ms Stearne] has requested that this file now be transferred to the [location 1] Family Court.

[136] In support of the transfer, lawyer for the child emphasised the fact that [Hemara] and [Ms Stearne] reside in [location 1] on a permanent basis and suggested that the Family Court Coordinator local to [Hemara] will likely be involved in locating supervised contact providers and a s 133 report writer.

[137] Rule 186 of the Family Court Rules provides as follows:

#### **186 Transfer of proceedings**

The court or a Registrar may order that proceedings in one office of the court be transferred to another office of the court if the court or, as the case requires, the Registrar is satisfied that the proceedings can be more conveniently or fairly dealt with in that other office of the court.

[138] This is a broad discretion but to exercise it in favour of a transfer I would need to find that either greater convenience or greater fairness will be achieved if this case is transferred to [location 1].

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<sup>28</sup> In light of the decision in *DN v Family Court at Auckland* [2020] NZHC 210. Previously the same case went to the High Court, as a judicial review, was *AA v Family Court at Auckland* [2018] NZHC 1638.

[139] [Location 1] will be much closer to where [Hemara] is going to be living in the care of his mother for the foreseeable future. He and his mother have made that city their home since mid-2017 with [Mr Swinburne]'s consent. However, I am also concerned about the distance that [Mr Swinburne] would have to travel to see [Hemara] in [location 1].

[140] I have decided that it would not be appropriate to direct a transfer for the following reasons:

- (a) I fear that there are likely to be significant delays if the matter is transferred to [location 1], particularly in completion of a report under s 133 of the Care of Children Act. I understand that the availability of report writers in [location 1] is even more constrained than it is in [location 4].
- (b) [Hemara]'s lawyer, Ms Stenhouse-White, is in [location 4] and I think it is in [Hemara]'s interest that she remains involved in the case given that he has established a relationship with her. There have already been a significant number of professionals involved in [Hemara]'s life.
- (c) In essence this matter is now part-heard. The parenting orders that I am making are interim orders and more information is needed before this Court can make final orders – hopefully orders which will secure long-term, better safe contact between [Hemara] and [Mr Swinburne].
- (d) This is a case that requires more judicial oversight than is usual. This complex case is therefore to be assigned to me pursuant to Rule 416UA.
- (e) In the orders that I make below I am also going to direct that supervised contact between [Hemara] and his father occur in [location 4]. This is for two principal reasons. They are:
  - (i) I apprehend there will be a better range of supervised contact providers available in [location 4], both professional formal

supervised centres and supervision in the community should such orders be appropriate in the future.

- (ii) It is important to [Hemara] that he understands that both of his parents support continuing contact with [Mr Swinburne]. If [Ms Stearne] transports him to [location 4] on a regular basis to see [Mr Swinburne] that may well represent for [Hemara] a de facto endorsement of the contact. It will show a commitment by both parents to [Hemara]'s relationship with [Mr Swinburne].
  
- (f) Finally, [Mr Swinburne] now lives and works in [location 2]. The time of his journey to [location 4] according to Google Maps is approximately two-and-three-quarter hours. The journey from [location 1] to [location 4] is approximately two-and-one-quarter hours. While both parties chose to relocate after these proceedings were issued, the Family Court at [location 4] nonetheless remains the central locus.

### **Orders and Directions**

[141] I accordingly make the following orders and directions:

1. A final parenting order granting [Ms Stearne] the day to day care of [Hemara].
  
2. An interim contact order where [Mr Swinburne] is to have contact at a professional supervision centre in [location 4] every third weekend on Saturdays between 10.00 am and 4.00 pm. I approve funding for an initial 14 sessions.
  
3. It is a condition of that contact that [Mr Swinburne] is not to discuss the issues in these proceedings with [Hemara].

4. [Hemara]'s brother [Paiwa] may attend some contact sessions with [Mr Swinburne] after the first 3 sessions if [Mr Swinburne] chooses and as and when that is convenient.
5. Pursuant to Rule 416UA I classify this case as complex. Where practicable future case events should be assigned to me.
6. [Hemara]'s lawyer is to file a memorandum within seven days of the date of this judgment addressing me on the issue of whether [Hemara] should be consulted before a s 133 report is sought. If she concludes that he should not be then within 14 days of this judgment the parties are to file a joint memorandum, or separate memoranda setting out a draft brief for the s 133 report writer. The file is to be referred to me once the memoranda are filed for further directions.
7. Lawyer for the child has leave to file a memorandum seeking any further incidental orders or directions focused on supporting [Hemara] and the parents through the transition to a resumption of contact between [Hemara] and [Mr Swinburne] and by supporting [Hemara] in light of the issues that he has raised.
8. Lawyer for the child is to file draft orders for sealing within seven days and provide them to [Ms Stearne] and [Mr Swinburne] for comment. Those draft orders along with any input from [Ms Stearne] and [Mr Swinburne] are to be referred to me within 14 days, although if there is no opposition to the draft they may be sealed immediately. They can address the commencement date of contact and if there is no agreement on that issue I will make a further direction.
9. I adjourn this matter to a case management conference to be allocated after four weeks' from now to address any further procedural directions that are required to advance this matter towards final resolution.

Signed at Auckland this 14<sup>th</sup> day of July 2020 at

am / pm

K Muir  
Family Court Judge