

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

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**IN THE FAMILY COURT
AT NEW PLYMOUTH**

**I TE KŌTI WHĀNAU
KI NGĀMOTU**

**FAM-2010-043-000729
FAM-2010-043-000728
[2022] NZFC 8870**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
AND	THE FAMILY VIOLENCE ACT 2018
BETWEEN	[DEBRA FAYEN] Applicant
AND	[FREDERICK LEES] Respondent

Hearing: 2 June 2022

Appearances: S Hurley for the Applicant
Respondent appears in Person
R Webb as Lawyer for the Children

Judgment: 27 October 2022

RESERVED DECISION OF JUDGE K BROUGHTON

[1] [Dillon] and [Vanessa] are the children of Ms [Debra Fayen] ([Ms Fayen]) and Mr [Frederick Lees] ([Mr Lees]).

Issues

[2] This hearing is to determine two separate issues under two separate Acts.

Issue 1

[3] The first issue is under the Family Violence Act 2018 (FV Act). The Court must determine whether a temporary protection order made on 19 October 2020, should be made a final order protecting not only [Ms Fayen], but her partner, Mr [Simon Crown] (Mr [Crown]), [Dillon], [Vanessa], Mr [Crown]'s daughter, [Samantha Crown] ([Samantha]) and [Ms Fayen] and Mr [Crown]'s son born after the temporary protection order was made, [Dale Crown] ([Dale]).

Issue 2

[4] The second issue is under the Care of Children Act 2004 (COCA) in regards [Vanessa]'s care arrangements. While [Dillon] is aged 15 years, [Mr Lees] has confirmed to the Court that he does not seek any determination for his care/contact arrangements with his son.¹

Background

[5] To provide context to these proceedings, I give the following brief background.

[6] [Ms Fayen] and [Mr Lees] were married on [date deleted] 2001. They are the parents of three children, [Leah] ([Leah]) (who has aged out of the COCA), [Dillon] and [Vanessa].

[7] The Family Court has been involved with this family since 2010. The following timeline is relevant to proceedings:

- (a) In September 2010, [Ms Fayen] applied on a without notice basis for an interim parenting order and temporary protection order. Both orders were granted but sometime soon after, the parties reconciled and [Ms

¹ Post hearing submissions on final outcome from [Mr Lees], dated 8 June 2022.

Fayen] applied to discharge the interim parenting order and temporary order.

- (b) The parties remained together until 17 April 2014, when they separated. From this point, they shared the care of the children.
- (c) The parties then reconciled in 2016.
- (d) The parties separated for the final time in May 2017.
- (e) On 30 October 2017, [Ms Fayen] applied on a without notice basis for a temporary protection order and parenting order. Those orders were granted. [Mr Lees] was directed to have supervised contact. He defended proceedings.
- (f) A further application was made by [Ms Fayen], pursuant to s 46R of the COCA, to move [Vanessa] from [School 1] to [School 2]. The Court determined that [Vanessa] remain at [School 1].
- (g) On 5 December 2018, the parties resolved FV Act and COCA proceedings by way of agreement and mutual code of conduct. A parenting order made that recorded all three children's care be shared on a week-about basis with changeover occurring on a Monday, after each school week.²
- (h) On 19 October 2020, [Ms Fayen] applied on without notice basis for leave to apply within two years for variation of parenting order, as well as a without notice application for a temporary protection order. A temporary protection order was granted. All three children are named in the temporary protection order, along with Mr [Crown] and [Samantha]. The application to vary the parenting order was placed on notice. [Mr Lees] defended proceedings, as well as filed an objection to attend a family violence programme.

² Bundle of Evidence, bundle 1, p 29.

- (i) On 5 October 2021, [Ms Fayen] filed a without notice application for warrant to enforce a parenting order, as well as an application for costs. While the warrant was granted, it was not uplifted because [Vanessa] was returned to [Ms Fayen]'s care.
- (j) On 15 October 2021, [Ms Fayen] filed a further application on without notice basis for variation of parenting order in relation to [Vanessa]'s care. That application was granted. [Mr Lees] was directed to have professionally supervised contact.

Witnesses

[8] A number of witnesses were called to give evidence. They included:

- (a) Dr Orr (Dr Orr) – s 133 report writer;
- (b) Ms Ingrid Benten (Ms Benten) – Contact supervisor;
- (c) Mr [Henry Fayen] (Mr [Fayen]) – [Ms Fayen]'s father;
- (d) Ms [Jenny Gladstone-Fayen] (Ms [Gladstone-Fayen]) – [Ms Fayen]'s niece;
- (e) Dr [Haddon-Knight] (Dr [Haddon-Knight]) – [Ms Fayen]'s mother;
- (f) Ms [Belinda Barr] (Ms [Barr]) – [Ms Fayen]'s sister;
- (g) Ms [Celine Vasquez] (Ms [Vasquez]) – [Mr Lees]'s partner;
- (h) Mr [Hawes] (Mr [Hawes]) – [Mr Lees]'s friend;
- (i) Mr [Fairlight] (Mr [Fairlight]) – [Mr Lees]'s friend.

[9] I have considered what each witness has said during the course of cross-examination, as well as what they have deposed in affidavit evidence. Throughout this decision I will reference various witnesses. If a witness is not referred

to, that does not mean that their views and evidence has not been taken into consideration.

Issue 1: Should a final protection order be made?

[10] [Ms Fayen] seeks a final protection order to protect her family unit.

[11] [Mr Lees] disputes that a final protection order is necessary. He seeks for the temporary order to be discharged.

The law – Family Violence Act

[12] The purpose of the FV Act as found in s 3 is to stop and prevent family violence in domestic relationships by:

- (a) recognising that family violence, in all its forms, is unacceptable; and
- (b) stopping and preventing perpetrators from inflicting family violence; and
- (c) keeping victims, including children, safe from family violence.

[13] When making a protection order, the Court must be satisfied that:

- (a) the parties are, or have been, in a family relationship;
- (b) that the respondent has used family violence; and
- (c) that the making of a protection order is necessary for the protection of the applicant and any child of the applicant.

[14] When considering whether to make a protection order, I turn my mind to ss 9, 10 and 11, which provides the meaning of family violence, abuse, and psychological abuse. I must also turn my mind to ss 82, 83, 84, and 87, which reminds me that there is a duty to consider whether apparently minor or trivial behaviour forms a pattern of family violence. I must have regard to [Ms Fayen]’s perception and the

effect of behaviour on her or children of the relationship. I must be mindful that other proceedings do not stop the making of a protection order. Finally, I must be satisfied that the making of a protection order, including Mr Neiderberger as a protected person, meets the threshold as recorded at s 87(3) of the FV Act.

[15] *Surrey v Surrey* provides guidance as to the application of similar sections as were found in the Domestic Violence Act 1995.³ This guidance has now been supplemented by the Court of Appeal decision in *SN v MN*.⁴

[16] In *Surrey v Surrey* it was stated that, for a protection order to be “necessary”, the Court must be satisfied of two things. Firstly, the Court must be satisfied that the applicant has proved there has been violence. Secondly, the Court must be satisfied that the applicant has a reasonable subjective fear of future violence.⁵ If this is proved, the evidential burden then passes to the respondent to demonstrate factors weighing against the necessity for an order.⁶

[17] In *SN v MN*, the followings points were deemed to assist in assessing the question of necessity and whether the order should be made:⁷

- (a) The inquiry is of course of a predictive nature but reliance on past behaviour is the most reliable guide to future conduct.
- (b) While some or all of the subject behaviour may appear to be minor or trivial when viewed in isolation or unlikely to recur, the Court is required to “consider whether the behaviour forms part of a pattern of behaviour in respect of which the applicant ... need[s] protection”.
- (c) As noted, the purpose of a protection order is to ensure not only safety from the risk of future violence but also that the applicant actually feels safe – that is a reference to the effect of past domestic violence on the applicant.
- (d) The question is not which party promoted a given situation but whether the protection order is needed.
- (e) While the Court may take into account several factors when deciding whether the evidence displaces the apparent need to grant a protection order, once an applicant satisfies the Court of the existence of past

³ *Surrey v Surrey* [2010] NZFLR 1 (CA).

⁴ *SN v MN* [2017] NZCA 289.

⁵ *Surrey v Surrey* [2008] NZCA 565.

⁶ At [122].

⁷ *SN v MN*, n 4, at [24].

violence and a reasonable subjective fear of future violence – described as shifting the evidential burden – such factors may do no more than guide the Court in any given situation. And factors identified as relevant in determining past cases do not reach the status of a statutory code or require formulaic application in other cases.

- (f) When conducting the inquiry into necessity it is not a question of weighing factors pointing to an order being necessary against those which operate to the contrary. Again, we repeat, it is an evaluative exercise to determine whether the protection order is necessary. (Footnotes omitted).

Analysis

Is there a family relationship?

[18] There is no doubt that [Ms Fayen] and [Mr Lees] have been in a domestic relationship.

Has [Mr Lees] used family violence against [Ms Fayen]?

[19] [Ms Fayen] relies on various allegations of violence during their relationship and post separation, including (but not limited to) the following examples:

- (a) Physical abuse, including an incident in [location A], whereby it is alleged [Mr Lees] manhandled [Ms Fayen] and removed her from a cabin.
- (b) The incident that occurred in September 2010, whereby [Mr Lees] threw a remote at [Ms Fayen], grabbed her by the scruff of the neck and lifted her out of the house.
- (c) Physical, psychological and verbal abuse of [Dillon].
- (d) Psychological abuse, including belittling [Ms Fayen] and ranting at her.
- (e) That [Mr Lees] is responsible for slashing all car tyres and breaking a double-glazed window of [Ms Fayen]’s [business premises] with a rock ([2020]).

[20] In addition to [Ms Fayen]'s own evidence, there is evidence from various family members of [Ms Fayen]'s. Her father, Mr [Fayen], gave evidence of attending to his daughter after the 2010 incident and how the children ([Leah] and [Dillon]) were distraught. Mr [Fayen] spoke of seeing his daughter with a split lip and mark on her forehead.

[21] [Ms Fayen]'s niece, Ms [Gladstone-Fayen], lived with the parties for a period. She says that [Mr Lees] and [Ms Fayen] argued a lot and that [Mr Lees] would frequently tell [Ms Fayen] to leave the home after an argument. Ms [Gladstone-Fayen] calculated this occurred every five weeks or so. She says that [Mr Lees] was passive/aggressive. Her evidence implies psychological abuse by [Mr Lees].

[22] Ms [Gladstone-Fayen] also referred to the long rants or, as Dr [Haddon-Knight] termed, "long monologues" and "tirades". This view is shared by all of [Ms Fayen]'s family who say they have witnessed this type behaviour or been subjected to it. They accept that they have not witnessed physical incidents but have been called soon after incidents to help [Ms Fayen].

[23] Ms [Barr] referred to the [location A] incident. She says it is the first time she was aware that there is physical violence within her sister's relationship. She accepts that she did not witness what happened but says that when her sister arrived at her home, bruising was apparent on her buttocks and thighs.

[24] Ms [Barr]'s evidence is that she also has witnessed [Mr Lees] putting her sister down and berating her. She says he only stopped when he realised that she was in the house with them. She says that she too has been at the receiving end of [Mr Lees]'s tirades, where he enforces his opinion and view and is not prepared to listen or entertain another's view.

[25] [Dillon] reported to his lawyer (and previously to his mother) that his father has physically disciplined him by slapping him with an open hand by the eye and flicking his ear. [Dillon] reported to walking on eggshells.

[26] The police reports state that this family has been the subject of very few family harm reports.

[27] The police report from September 2010, refers to a PSO being issued against [Mr Lees] but that there was a fight with the female party ([Ms Fayen]) being the aggressor. That report confirms [Mr Lees] acknowledged throwing the remote, which he says hit [Ms Fayen] accidentally and pulling her out of the house.

[28] There is another family harm incident that records [Mr Lees] as the main aggressor. This incident took place in June 2019. [Leah] left her mother's care after an argument and went back to her father's. The police noted [Mr Lees] as being the main aggressor due to his "poor attitude" towards [Ms Fayen] on the phone. It was further noted that he was not cooperative and was arrogant to police.

[29] [Mr Lees]'s evidence denies being violent but acknowledges that he has had to respond "in like" – my words – to [Ms Fayen]'s actions. I use the words "in like" to illustrate that the evidence before me from [Mr Lees], both in written evidence and oral evidence, is either a complete denial of using family violence or that he reacted "in like" or in a certain way that may have amounted to family violence but that this reaction was only brought about due to the way in which [Ms Fayen] has acted or was necessary to discipline the children.

[30] For example, in regards the [location A] incident, [Mr Lees] denies pushing [Ms Fayen] but accepts he stood in the doorway. He says that she was trying to push past him. He accepts he threw her bags out of the cabin.

[31] In regards the incident in September 2010, [Mr Lees] accepts he threw a remote and lifted [Ms Fayen] in a fireman's lift to remove her out of the house. His evidence minimises his behaviour and deflects back to [Ms Fayen]'s alleged behaviour. When questioned, he agreed he threw the remote to but not at [Ms Fayen], yet accepts he was "pissed off". He accepts that he manhandled her to lift her out of the house but acknowledges that it was not perhaps the most "wisest move".

[32] [Mr Lees] justifies flicking the children's ears as a form of discipline. He acknowledges grabbing [Dillon] by the scruff of the neck (which [Mr Lees] refers to as the collar) to prevent him from hurting others in the context of [Dillon] playing around with a stick and rocks and not listening to his father's warning that he may hurt someone.⁸ The s 133 reports [Mr Lees] maintaining his view that his behaviour is appropriate in circumstances where he is exercising parental control and discipline.⁹ In evidence [Mr Lees] said "...I thought some physical intervention was the best way to stop him..."¹⁰ and "I didn't think it was assault because it was done in the context of trying to prevent the child from hurting others and I didn't view it as being an assault".¹¹ [Mr Lees] went on to say that [Dillon] was not hurt and that his feelings were hurt more than anything.

[33] [Mr Lees] accepts he talks and attempts to explain his position but does not view that as being overbearing or amounting to psychological abuse. On the contrary, [Mr Lees]'s evidence is that he is frustrated that others ([Ms Fayen]'s family, professionals and the Court) do not understand his point of view and why the entire situation is unfair to him.

[34] Having considered the evidence, I am satisfied that [Mr Lees] has used family violence against [Ms Fayen]. [Mr Lees] himself accepts he has manhandled [Ms Fayen] and thrown an object towards her direction in anger. He accepts he has resorted to "physical intervention" to discipline/control [Dillon]'s behaviour.

[35] These acknowledgements alone amount to acknowledgements of using family violence. Having listened carefully to [Mr Lees], I have concluded that he believes his actions are justified when taken in (his) context. That being his subjective observation. From an objective point of view, [Mr Lees]'s actions amount to family violence as defined by the FV Act. He has used behaviour that is intended to control/coerce, which has caused harm, namely to [Ms Fayen] and [Dillon].

⁸ Notes of Evidence, p 264, lines 18-34.

⁹ BOE, bundle 1, p 191.

¹⁰ NOE, p 254, line 10.

¹¹ NOE, p 254, lines 19-21.

[36] I specifically refer to the [location A] and September 2010 incidents. [Mr Lees] acknowledges his behaviour during these incidents. While I considered he has minimised his behaviour (on the basis that [Ms Fayen] was also being abusive to him), I also take into account those witnesses who have seen [Ms Fayen] after the event(s). While they cannot give evidence as to what has occurred, they can give evidence as to [Ms Fayen]’s presentation soon after. In particular, I found Mr [Fayen][Fayen] and Ms [Barr]’s evidence compelling. I did not get the impression that they inflated their evidence. Ms [Barr] said that she had been present on one occasion when she had heard [Mr Lees] berating her sister. Verbal abusive is a form of family violence. All of [Ms Fayen]’s witnesses’ have also been privy to [Mr Lees]’s propensity for long monologues or tirades – whether verbal or by way of text. [Mr Lees] himself said in evidence that if he says anything that is considered lengthy then it is out of frustration.¹² That, however, does not justify that behaviour. It was very clear throughout the hearing that the crux for [Mr Lees] is that he has not felt heard and feels he has not had the opportunity to “say his piece”. As I say, I have considered the evidence and re-read the notes of evidence. [Mr Lees] was given time to answer those questions put to him and has filed written evidence to address the issues raised. I consider he has now had the opportunity to be heard and my conclusion is that he has used family violence against [Ms Fayen] and [Dillon].

[37] I note for completeness the allegations of [Mr Lees] exposing the children to family violence, including [Samantha], Mr [Crown]’s daughter, at handover.

[38] Both parties have provided evidence around the incident involving Mr [Crown] in October 2020. [Ms Fayen] says at handover [Mr Lees] started chastising her about email correspondence and [Dillon]. [Vanessa] and [Samantha] were present, as was Mr [Crown]. [Ms Fayen] says [Mr Lees] held the car door open and an argument started between the men. [Mr Lees] denies any aggression and says there was no argument. Mr [Crown] has not provided any evidence as to what he says happened. What the evidence does show is that around this time emails were being sent between [Mr Lees] and [Ms Fayen]’s lawyer about [Dillon] not wanting to go to his father’s. In a six page letter to [Ms Fayen]’s lawyer, [Mr Lees] referred to [Ms

¹² NOE, p 326, lines 10-11.

Fayen]’s “fawning behaviour” over [Dillon] and that [Dillon] is not one to be considered “mature or articulate”.¹³ He goes on to say that [Dillon], while sensitive, engages in “malevolent and antisocial behaviour”¹⁴ and that “[Debra]’s constant attempts to make up stories around violence, anger and mental health issues are getting kind of old Susan. Super old”.¹⁵ When I consider the way in which this letter is written and when it was written (29 September 2020), the language used, the contempt towards [Ms Fayen] and the critical analyses of [Mr Lees]’s own son, I draw the conclusion that come handover on 12 October 2020, on the balance of probabilities, [Mr Lees] was likely to have been frustrated and upset. [Mr Lees]’s own evidence, which is corroborated by [Ms Fayen]’s family members, is that when he wishes to get his point across, he will not stop until he does. I conclude that this more likely than not to have occurred on this occasion, in the way as described by [Ms Fayen] – that [Mr Lees] held the car door open in order to have his say and that an argument ensued with Mr [Crown].

[39] Mr [Fayen] reports of a time that he was assisting with handover (approximately two years ago) and [Mr Lees] had his foot in the door while trying to speak to [Mr Lees]. Mr [Fayen] said that [Mr Lees] was badmouthing his daughter and that he asked [Mr Lees] to stop. Mr [Fayen]’s evidence is that he would not, and that [Mr Lees] went “on and on and on”. The situation came to an end with Mr [Fayen] driving away and the door closing. His evidence is that he found the whole experience traumatic. [Mr Lees] says that they were having a discussion and Mr [Fayen] started accusing him of inviting other women to the family home. [Mr Lees]’s evidence is that “... I should have walked away but [Henry] initiated it...”.¹⁶ Again, when I consider the evidence of [Mr Lees]’s insistence to be heard, I find it more likely than not that when Mr [Fayen] asked [Mr Lees] to stop and remove his foot, he did not.

[40] In coming to this conclusion, I have considered the evidence from [Mr Lees]’s witnesses. Ms [Vasquez] has not witnessed [Mr Lees] be violent since they met in 2018. Likewise, Mr [Hawes] and Mr [Fairlight] spoke well of [Mr Lees] and that he is friendly and social and that they have not witnessed him become abusive (whether

¹³ BOE, bundle 1, p 37.

¹⁴ BOE, bundle 1, p 40.

¹⁵ BOE, bundle 1, p 41.

¹⁶ NOE, p 280, line 6.

under the influence of alcohol or not). They, like [Ms Fayen]'s witnesses, were not present at the incidents as outlined above. Unlike [Ms Fayen]'s witnesses, their evidence does not refer to any direct contact with either party after the alleged incidents described.

[41] I finally note that I do not find against [Mr Lees] in regards the incident whereby tyres were slashed and a window was broken at her [business premises]. As [Ms Fayen] accepts, there is no corroborating evidence, including witnesses to this incident. The law is clear that while an issue needs to be determined on the basis of the balance of probability, the more serious the allegation, the higher the Court's expectation as to evidence and proof as to who the perpetrator was. [Ms Fayen] surmises that it was [Mr Lees] given proceedings and escalating conflict. [Mr Lees] says he had nothing to do with what occurred and that he was at home with his partner and the children. I am not prepared to find against [Mr Lees] on the evidence provided.

Is a protection order necessary for the protection of [Ms Fayen] and her family unit?

[42] I refer above to para [13](c) whereby if the Court is satisfied that [Mr Lees] has used family violence, then the Court must next be satisfied that the making of an order is necessary.

[43] In considering whether to make an order, the Court must have consideration to the perception of the applicant (or a child of the applicant's family, or both), the nature and seriousness of the behaviour and the effect that behaviour has on the applicant (or child of the applicant's family, or both). Once the applicant has satisfied the Court that there has been violence and that they have a reasonable subjective fear of future violence, the burden shifts to the respondent to satisfy the Court that there are countervailing factors against making a protection order. Put more simply, [Ms Fayen] must establish the existence of past family violence and that she holds a reasonable subjective fear of future family violence. The Court needs to objectively assess the reasonableness of her perception in terms of s 79(b) of the FV Act.

[44] [Ms Fayen] has established that past family violence has been used.

[45] [Ms Fayen] says that she has a reasonable subjective fear of future violence, particularly given the escalating conflict between the parties and issues arising out of childcare arrangements, noting that the parties separated in May 2017. She says that [Mr Lees] has demonstrated that as soon as there is not a protection order (temporary) in existence, [Mr Lees] starts using behaviour that amounts to family violence against her again.

[46] [Ms Fayen] accepted in oral evidence that [Mr Lees] has not made direct contact with her since the making of the temporary protection order in 2020. She says that there have been “drive-bys” past her house but acknowledged there is no evidence to support this. She accepts that when family violence proceedings were resolved in 2017, she and [Mr Lees] communicated directly but she says that was not without its problems at times.¹⁷ Her oral evidence acknowledged that communication about the children could become unhealthy communication by both of them.

[47] [Ms Fayen]’s evidence around the need for a final protection order is very much focused on the need to create a boundary. She is concerned that without an order, [Mr Lees] will default back to bad behaviour. She says he respects when an order is in place but at times pushes those limits – such as [Mr Lees]’s attendance a school prize giving and [Leah]’s soccer game. [Ms Fayen] says that the existence of an order creates safety for her, her partner and the children. It draws a line in the sand as to communication, which [Ms Fayen] says is important because [Mr Lees] does not like to be ignored and will persist to get an answer.¹⁸

[48] In order to assess necessity, I must consider the implied breach of the temporary protection order made 19 October 2020, namely the incident at [Leah]’s soccer game in December 2020.

[49] [Ms Fayen]’s position is that [Mr Lees] deliberately sat close to her at this game. She says that despite emails being sent between her lawyer and [Mr Lees] to get an understanding as to [Mr Lees] staying 100 metres away from her, he pushed boundaries by sitting in view and within 100 metres. [Mr Lees]’s emails to [Ms

¹⁷ NOE, p 100.

¹⁸ NOE, p 113, line 15.

Fayen]’s lawyer refers to having no intention of interacting with [Ms Fayen] but that could not control her movements (thus whether he would always be 100 metres from her) and that this was an example of how impacted the children are due to the false allegations made by [Ms Fayen] that resulted in her obtaining a temporary protection order.

[50] [Ms Fayen] says she contacted the police and advised that while there was no contact between the two of them, she would like for [Mr Lees] to be reminded of his obligations and conditions found within the temporary protection order. Contrarily, [Mr Lees]’s position is that he arrived at the game late, there were not many spots left around the ground and his sitting near to [Ms Fayen] was unintentional. He says that the picture provided in evidence was not a true representation of the amount of people at the game and that he did not even see [Ms Fayen] until later, when he recognised a person she was sitting next to. [Ms Fayen] accepts that [Mr Lees] did not approach her. She, however, says she felt intimidated with him being so close.

[51] I do not consider this incident to be a breach on the basis that [Ms Fayen] “just wanted him [[Mr Lees]] spoken to”.¹⁹ However, it does demonstrate how each party perceives the other’s actions. [Ms Fayen] knew that [Mr Lees] was attending at soccer. [Mr Lees] knew that [Ms Fayen] wanted him to respect the 100 metre boundary.

[52] I cannot determine on the evidence, whether [Mr Lees] had the intent to intimidate (he says he did not). The evidence from [Ms Fayen] is the perception was that [Mr Lees] made a point of sitting close to her to achieve this. In saying this, [Ms Fayen] was aware that [Mr Lees] would be present at the game.

[53] [Ms Fayen] also makes references to other alleged breaches of the temporary protection order by [Mr Lees] that she has “let slide”. However, without evidence of these incidents or what took place, there is little weight that can be given to these claims.

[54] It was put to [Ms Fayen] that as she accepts there has been no breaches and that both parties have moved on with new lives and partners, a final protection order

¹⁹ Family Harm Report dated 7 December 2020.

is not necessary because [Mr Lees] has made clear he wants nothing to do with her. [Ms Fayen]'s response was that without a protection order, she believes [Mr Lees] will start old behaviours again.

[55] When I consider necessity, I must objectively look at all evidence, the nature and seriousness of past behaviour and the effect that that behaviour has had on [Ms Fayen].

[56] While I have determined that [Mr Lees] has used family violence against [Ms Fayen], I note that those incidents relate back to when the parties were together and at the time of the making of the order, involving handover. From an objective perspective and when considering that the parties have separated and moved on with their lives, I cannot conclude that [Ms Fayen]'s subjective fear of future physical violence is reasonable.

[57] The behaviour that [Ms Fayen]'s evidence refers to when she applied for the current temporary protection order related also to [Mr Lees]'s propensity to call, email and message when he has something he wishes to discuss. She refers to [Mr Lees] not taking no for an answer and persisting with getting his message across.

[58] [Ms Fayen] was pregnant when she received a call from [Mr Lees] about [Dillon] not wanting to go to contact. From an objective perspective, it is understandable how that call, in that context and when issues were raw in terms of care arrangements, distressed her. It is further understandable, passed on the evidence, how [Mr Lees]'s long monologues could be viewed as (low level) psychological abuse. However, when I consider the evidence and whether there is a reasonable objective fear of this behaviour continuing, I conclude not. [Ms Fayen]'s evidence is that she and [Mr Lees] do not have contact. [Dillon] no longer has contact with his father and [Mr Lees] is not pushing that contact.

[59] The submissions of lawyer for child raise no issue with threats to the safety of the children on the basis that any parenting order is clear as to conditions around the use of physical discipline and either parent exposing the children to adult discussions about the other or extended family.

[60] There is no denying that there is a significant level of inter-parental conflict between the parties. Their inability to communicate and the level of conflict that has subsequently arisen has had a significant impact on their children. This is evidenced by the strained relationships of [Leah] and [Dillon] with their parents respectively.

[61] However, the only communication or interaction that is necessary between the parties now is that to do with [Vanessa]. With such limited interaction necessary between the parents, and on the basis that any interaction that does occur is managed in a way that places boundaries on communication, such as communicating only through the OurFamilyWizard app, I am of the view that the parenting order will mitigate the escalation of conflict between the parties and facilitate interactions in a way that provides the boundary that [Ms Fayen] seeks.

[62] For completeness, I have also considered countervailing factors against making a protection order. These include that the parties have been separated since May 2017, have each established new relationships, resolved relationship property and that [Mr Lees] has stated quite clearly he wants nothing to do with [Ms Fayen] (and she likewise) save for communication about [Vanessa]. I, however, give [Mr Lees] a word of caution – he has repeatedly said that [Ms Fayen] obtained the temporary protection order(s) on false pretences. His evidence has been that the Court has never determined whether he has used family violence. I have concluded that he has. Further, [Mr Lees] has had sufficient time to “air” his grievances, including addressing [Ms Fayen]’s family members direct. This issue must now rest. If [Mr Lees] reignites discussions direct with [Ms Fayen] about these proceedings or their history that would in my mind, give just cause for [Ms Fayen] to apply for another protection order.

[63] Accordingly, [Ms Fayen]’s application for a final protection order is dismissed.

Issue Two: What should [Vanessa]’s care arrangements be?

[Ms Fayen]’s position and reasons why she wants the day-to-day care of [Vanessa]

[64] [Ms Fayen] seeks:

- (a) The day-to-day care of [Dillon] (uncontested) with contact undefined but led by [Dillon] at times agreed/sought by him.
- (b) The day-to-day care of [Vanessa] with contact to [Mr Lees] being every alternate Thursday to Monday or Friday to Tuesday. Contact handover would occur at school, or alternatively, at her gate if the handover day fell on a holiday or it was during the school term holidays.
- (c) That school term holidays to be shared equally if [Mr Lees] or his partner are available to care for [Vanessa].
- (d) That [Mr Lees] would have additional Christmas school holiday contact should he wish.
- (e) That other contact, such as email, telephone and text messaging be available for [Mr Lees] and the children.
- (f) Christmas arrangements to continue as they have been.
- (g) That any parenting arrangements are not a breach of any protection order that may be granted and that [Mr Lees] is not prevented from attending school or sporting activities on the basis that he does not approach her.
- (h) That there are conditions in the parenting order relating to adult conversations, no physical discipline and communication through the OurFamilyWizard app using the Tone Meter except in an emergency.

[65] [Ms Fayen]'s evidence is that she opposes [Vanessa] moving into her father's day-to-day care. She does not agree that this is in her daughter's best interests. She does not agree that she has subjected [Vanessa] (or [Dillon]) to any influence or alienation.

[66] [Ms Fayen] is concerned about unsupervised contact due to the allegations raised by the children that they are exposed to physical discipline ([Dillon]) and psychological abuse (such as the long talks).

[67] [Ms Fayen] is particularly concerned about [Vanessa] being exposed to her father's negative views about her and [Mr Lees]'s insistence that his grievances/feelings are known and accepted by the children. In oral evidence, [Ms Fayen] referenced [Leah] and that she is aligned with her father's view due to "oversharing". [Ms Fayen] is concerned that the same pattern will occur with [Vanessa].

[68] [Ms Fayen] views moving from supervised contact to unsupervised contact as a great leap. Notwithstanding her concerns, she is open to do that on the basis that contact occurs fortnightly. One of the concerns that [Ms Fayen] has is [Vanessa] not being supported by [Mr Lees] when she is in his care, to the same level that she says she supports [Vanessa]. She says she also worries about the activities that [Vanessa] does and [Mr Lees] getting her to those activities on time.

[69] When questioned, [Ms Fayen] was unable to answer whether she sought for [Mr Lees]'s contact to be in one block or split up over the fortnight.

[70] [Ms Fayen] agrees to using OurFamilyWizard to communicate. [Ms Fayen] is also not opposed to a third party being involved in order to effectively arbitrate between herself and [Mr Lees] if an issue arises that they are unable to agree upon. [Ms Fayen] accepts that there may be a cost with this, but ultimately, she would be prepared to bear half the cost if it was reasonable.

[Mr Lees]'s position and reasons for why he wants day to day care of [Vanessa]

[71] [Mr Lees] seeks:

- (a) No order in respect of [Dillon] or for his contact with [Dillon].
- (b) A parenting order recording that he has the day-to-day care of [Vanessa] and that [Ms Fayen] has supervised/supported contact.

[72] [Mr Lees] seeks that [Vanessa] is effectively in his day-to-day care and that [Ms Fayen]’s care/contact with her is by way of supervision/parenting therapy. The basis for [Mr Lees]’s position is that he wishes to shield [Vanessa] from any undue influence from her mother that will degenerate his relationship with his daughter. [Mr Lees] is of the view that [Vanessa] has been prevented from having a natural and ongoing relationship with him. He says that there is no other way to ensure that this will continue unless she is in his care. Put simply, [Mr Lees]’s position is that he has no trust in [Ms Fayen] to support or facilitate his relationship with their daughter on any kind of shared-care basis. He points to his relationship with [Dillon] as being demonstrative as to the risk of his and [Vanessa]’s relationship declining if the Court were to maintain the status quo or provide him with the contact that [Ms Fayen] is seeking.

[73] If the Court does not place [Vanessa] in [Mr Lees]’s day-to-day care, he would be seeking care during the school holidays, as well as summer school holidays. He would also like to see the children on their birthdays and hear from them on Father’s Day and his birthday. He would like [Vanessa] to be able to contact him freely by way of phone or by way of social media exchange.

[74] In regards schooling matters, it is important for [Mr Lees] to be involved in [Vanessa]’s schooling, such as attending her school camps and also school events. He is not opposed to there being a condition in the order that he not approach [Ms Fayen]. In fact, his preference is “no interaction at all”.

The law – Care of Children Act

[75] I must take into account that the welfare and best interests of the children is paramount in accordance with section 4 of the COCA.

[76] I am mindful of the principles of s 5 of the COCA. Section 4(2)(a)(ii) requires the Court to consider the relevant s 5 principles. As held in the Supreme Court decision *Kacem v Bashir*, the Court needs to not only identify the s 5 principles that are relevant, but also those that are irrelevant and why.²⁰

²⁰ *Kacem v Bashir* [2011] 2 NZLR 1, [2010] NZFLR 884, (2010) 28 FRNZ 483 (SCNZ).

[77] I acknowledge s 6 of the COCA that provides that the children’s views must be considered.²¹ This does not mean that these views are determinative of what the Court decision should be. I need to have regard to the children’s ages, level of maturity and awareness of all the relevant factors.²² I must also have regard to the extent that those views might have been the subject to manipulation or improper influence.

The children’s views

[78] Lawyer for child, Ms Webb, has had various attendances on the children.

[79] With respect to [Vanessa]’s views, Ms Webb filed two memoranda on 20 May 2022 and 27 May 2022 respectively.²³

[80] I met with the children and lawyer for child after the hearing. Both children were as described by Ms Webb and Dr Orr. They were delightful, incredibly easy to speak with and charming. They are a credit to their parents.

[Dillon]

[81] [Dillon] reported to me that he was “pretty happy” with how things were. He felt that life was going well for him. He really enjoys school and described himself as above average.

[82] [Dillon] does not present as a superficial kind of teenager. He was thoughtful, considered and, in my view, mature for his age. This was not only reflected in our discussions about his father, but also reflected in our discussions about his schooling. [Dillon] wants to be successful and takes his education seriously. He has dreams and ambitions, which are incredibly important to him.

[83] [Dillon] was reflective when speaking about his father. He said that he has pushed things to do with his father “to the back of his mind”. He talked about feeling split around how to approach matters concerning seeing his dad again. One of the

²¹ *GF v EF* [2019] NZHC 3140.

²² *C v S* [2008] NZFLR 715.

²³ Fifth memorandum of lawyer for child in anticipation of hearing, dated 20 May 2022; and sixth memorandum of lawyer for child in anticipation of hearing, dated 27 May 2022.

biggest things for [Dillon] is a chance to have “a breather”. He needs time to process and think about things.

[84] [Dillon] described his worries around reconnecting with his father. These included the intense conversations they have (often monopolised (my word) by his father), his reflections on their past experiences that have not always been favourable, and the general “uncomfortable” situation that has arisen in their relationship.

[85] There is a part of [Dillon] that wants to have contact with his father. He spoke about the prospect of there being some text messages between them, which he would see as an icebreaker. In saying this, he said he needs time to really think about what that would look like. [Dillon] said to me, “I think it would be nice if Dad did text me. I haven’t blocked him on total social media”. [Dillon] thought maybe once a week or every fortnight, his father could text and perhaps their communication could start like that. At this stage, [Dillon] does not want to speak to his father. He thinks texting will be sufficient.

[86] [Dillon] also said that there is a part of him that would really like some father and son time. He says that he enjoyed that when it occurred. If this were to occur in the future, it is important to him that his dad acknowledges how he feels about the questioning and the intense conversations, which (from [Dillon] point of view) are concentrated on his father making his views clear (sometimes at the expense of [Dillon]’s own views and opinions).

[87] It is clear from [Dillon] that he needs to measure, for himself, the way in which his father is going to approach this kind of contact. If it is done at [Dillon]’s pace and with little expectation on [Mr Lees]’s behalf that [Dillon] may or may not respond, I anticipate that contact will evolve organically. As I say, [Dillon] has not blocked contact or the prospect of reconnecting again with his father. What I can say to [Mr Lees] is that I do not see any merit in trying to establish or discuss with [Dillon], what went wrong or who was/is to blame. That approach will not assist relations, is not child focused and is unlikely to repair the divide between father and son.

[Vanessa]

[88] [Vanessa], like her brother, is a charming young lady. She was very easy to talk to, although took some time to warm into the conversation. Her relationship with her brother is clearly strong. She would often glance at him for reassurance.

[89] [Vanessa] told me that she does a lot of things, including [activity 1], which occurs on the Thursday [afternoons]. She has [activity 2] on a [Friday afternoon], and then on Saturday she has [activity 1] again [in the afternoon]. She also has the option of going to [activity 3] with [Leah] on a [Sunday afternoon].

[90] [Vanessa] wants to have increased contact with her father. Her preference is from Thursday to Sunday. She tells me that she spoke about this arrangement with her mother. [Vanessa] explained to me that this arrangement would be “week one” and that week one would fall when [Samantha] would normally be at her mother’s home. [Vanessa] thinks that it would be good to have some space from her.

[91] In week two, [Vanessa] thought she would like Saturday overnight with her father from 3.30 pm on Saturday until 12 noon on Sunday. That would give her a chance to see her father on the alternate week.

[92] Like [Dillon], [Vanessa] spoke about her worries at her father’s. These worries are primarily centred on the very long discussions that she says, he has with her. Like [Dillon], she feels that these discussions are not always two-sided. She says that her father can just keep on talking, which is normally explaining something to her. She finds that quite boring. An example that [Vanessa] gave to me was that if she mentioned something about a rainbow, her father would go into a deep-dive discussion around how rainbows are made and lots of other science and facts behind them. [Vanessa] said she would just like a “normal” discussion rather than it being so intense.

[93] Apart from the long discussions, [Vanessa] enjoys her time with her father and talked about how she plays with him and that she enjoys walking and surfing with him. She wishes to spend school holidays with her father, but when we spoke, she was a little unsure about what that duration would look like. In summary, [Vanessa]

is ready to move on from the current contact arrangements. She wants to spend more time with her father.

[Dillon] and these proceedings

[94] Given [Mr Lees] does not seek an order for [Dillon], the remainder of this decision will primarily focus on [Vanessa] and her care arrangements but will include the views of Dr Orr and what lawyer for child has reported from all children.

[95] [Dillon]’s discussion with me is included so that [Mr Lees] understands what his son has said and to provide guidance around how [Dillon] views potential future contact with his father.

[96] While [Mr Lees] seeks no order for [Dillon], I will make a parenting order, which records that he is in his mother’s care. I do that because I have considered his views as told to Dr Orr and discussions we have had. I think for [Dillon], there is a sense of security with being part of an order, notwithstanding his age. I find that recording [Dillon] to be in his mother’s day-to-day care addresses s 4 of the COCA. I will make no provision for contact, although as I say, the door is not closed for [Mr Lees].

Dr Orr – s 133 report

[97] Dr Orr completed one report for these proceedings dated 10 August 2021.²⁴ Dr Orr had previously also done a s 133 report in November 2018, which relates to proceedings that were thereafter discontinued.

[98] Dr Orr observed that both [Mr Lees] and [Ms Fayen] “presented as very intense people who had clear views of the situation”.²⁵ She went on to describe [Mr Lees]’s views as being “dogmatic and unable to be challenged” and that [Ms Fayen] was more considered and acknowledged the children’s wishes being important to hear and for her to understand their views and take them on board.²⁶

²⁴ BOE, bundle 1, p 185.

²⁵ BOE, bundle 1, p 196, para 45.

²⁶ Ibid.

[99] Dr Orr described that each parent had a “polarised perspective of the other”, which has resulted in significant communication difficulties. She suggests that the Court formalise a parenting order and communication strategies in a strict as manner as possible.²⁷

[100] It is important to note that Dr Orr is of the view the children have resilience, which suggests “good enough parenting” is occurring. She, however, is clear that this family will need to parallel parent moving forward. Dr Orr has described parallel parenting as “what happens in each home stays in that home, with guardianship decisions requiring agreements spelled out”.²⁸

[101] Dr Orr’s report raised a number of concerns in terms of parental behaviours that will likely have a long-term psychological effect on the children. These behaviours include:

- (a) both parents talking to the children about adult issues;²⁹
- (b) changeovers and each parent extending their stay with view to influencing the children;³⁰
- (c) the parents’ inability to communicate effectively and their dislike for each other, including Mr [Crown]’s unhelpful behaviour of emailing [Mr Lees]’s workplace with negative comments;³¹
- (d) that the sibling relationship is at risk of fracturing due to parental alignment and that it is the parental conflict that underpins that fracturing.³²

[102] Dr Orr refers to “attunement in her report”. In oral evidence she explained attunement as being “the connection and the emotional understanding between two

²⁷ BOE, bundle 1, p 196, para 46.

²⁸ BOE, bundle 1, p 197, para 47.

²⁹ BOE, bundle 1, p 198, para 48(d).

³⁰ BOE, bundle 1, p 198, para 48(g).

³¹ BOE, bundle 1, p 198, para 48(h).

³² BOE, bundle 1, p 201 para 59.

people”.³³ Dr Orr referred to [Leah] having a strong attunement to her father and some attunement with her mother. In regards [Dillon], and how he described his relationship with his father, Dr Orr concluded there was little attunement with [Mr Lees]. In contrast, he has a strong attunement to his mother. In regards [Vanessa], Dr Orr said that at present she was walking a fairly “neutral line”, although Dr Orr finds that her attunement towards her mother may be slightly stronger than that of her father.³⁴

[103] Dr Orr also addressed the concern that [Mr Lees] has that [Ms Fayen] has alienated him from the children. The concept of alienation is where one parent “deliberately and either overtly or covertly, sabotages a child’s relationship from a previously favoured parent”.³⁵

[104] Dr Orr was clear in both her report and in her oral evidence that she does not believe that [Ms Fayen] has alienated (using the definition above) [Dillon] from his father. Dr Orr acknowledges that there had been influence of sorts, generated by a combination of factors, including [Dillon] forming his own views about his father and the way that his father interacts with him.³⁶ Dr Orr’s evidence was that none of the children are refusing contact with the other parent. [Leah] chooses to have infrequent contact with her mother, but she is still having contact. [Dillon] was working towards more contact with his father but withdrew that due to his perception of [Mr Lees]’s behaviour. In her report and when describing her discussions with [Dillon] and [Mr Lees]’s discussions with her, Dr Orr said that [Mr Lees] informed her “that he is telling young people about his perceptions of the situation and that these are the only truth and non-negotiable”, highlighting the disconnect between [Dillon] being able to express his views without condemnation.

[105] When I consider Dr Orr’s evidence and a parenting arrangement for [Vanessa], I highlight the following as being relevant:

³³ NOE, p 3, lines 8-9.

³⁴ BOE, bundle 1, p 198, para 48(e).

³⁵ BOE, bundle 1, p 203, para 68.

³⁶ NOE, p 5, lines 13-33.

- (a) that [Vanessa] may, because of the high level of parental conflict, walk away from one parent because there will come a point where she will need to choose a side, if the conflict continues;
- (b) that due to [Mr Lees]'s dogmatic approach, [Vanessa] may walk away from her father;
- (c) that the parties may benefit from using OurFamilyWizard to communicate;
- (d) that both parties need to support contact – whatever the arrangement is – and if an issue arises, not blame the other but try and work through the issue by observing [Vanessa]'s emotions not words;
- (e) that supervised contact for the non day-to-day care parent will not be in [Vanessa]'s best interests but that there should be protective measures in place (for [Mr Lees], Ms [Vasquez] was identified as a positive and neutral person. In contrast Mr [Crown] was not seen as a neutral person in [Ms Fayen]'s household);
- (f) that contact, if [Vanessa] is in [Ms Fayen]'s care, should consider the length of time in between visits to [Mr Lees]'s home;
- (g) that any parenting arrangement should implement the concept of parallel parenting and that only the major issues are negotiated in order to avoid ongoing dispute and conflict of micro issues;
- (h) that because of the parties' dynamics and inability to communicate, the best arrangement will be one where care is "set in stone" as opposed to flexible (notwithstanding that a flexible arrangement really is in the best interests of [Vanessa] because as she matures, she will need flexibility);
- (i) that time with the non day-to-day care parent is best suited in a block to reduce the coming/goings between households;

- (j) the any calls made to the absent parent should be infrequent (made at the halfway point of contact) and should be “short, sweet and supportive”.

Ms Benten – Linking Kin

[106] Ms Benten has been supervising contact between [Vanessa] and [Mr Lees].

[107] Ms Benten described contact between [Vanessa] and her father as positive. She described some concerns around [Ms Fayen]’s interactions with [Vanessa] at contact handover with [Vanessa] presenting quite differently in front of mother to how she presents once her mother leaves. Ms Benten observed a lack of encouragement from [Ms Fayen] in regards preparing [Vanessa] contact.

[108] Ms Benten said that at the start, [Vanessa] appeared reticent about contact and almost “frightened” when she arrived with [Ms Fayen] but that that presentation disappeared as soon as [Ms Fayen] left. Ms Benten noted [Mr Lees] giving [Vanessa] parental guidance and interacting with her in a natural and appropriate way. She observed [Vanessa]’s easy rapport with his partner.

[109] Ms Benten has no concerns about supervised contact or how [Mr Lees] presented. Her primary concern was that of [Ms Fayen]’s inability to encourage contact.

Analysis

[110] In terms of analysis, I will refer at times to “the children” notwithstanding that the proceedings relate primarily to [Vanessa]’s care arrangements.

The principles relating to the children’s welfare and best interests

Section 5(a)

[111] Section 5(a) requires that a child’s safety is to be protected and, in particular, for them to be protected from all forms of violence as defined in the FV Act 2018.

[112] The issue of safety has already been canvased in discussions around whether a final protection order should be made. While I have determined that [Mr Lees] has used family violence against [Ms Fayen] and [Dillon], I have also found that the making of a final protection order is not necessary.

[113] Dr Orr's report has identified concerning behaviour around his physical discipline of [Dillon], as well as the flicking of the children's ears.

[114] [Vanessa] must be protected from all forms of violence, which includes physical discipline. A suggestion has been made that this can be managed by way of a condition being put in place that there is no physical discipline of [Vanessa]. I find that the issue of physical discipline can be safely managed in this way and with that condition.

[115] The more concerning aspect of [Vanessa]'s safety and being protected from family violence relates to her being protected from psychological abuse.³⁷ [Vanessa] has been exposed to parental conflict. I have no doubt that she has witnessed her parents making disparaging the other. She has been exposed to unpleasant handovers involving her parents, Mr [Crown] and her grandfather, Mr [Fayen].

[116] I consider this adult conflict clearly amounts to psychological abuse. It must stop and if the only way to achieve that is by the parents parallel parenting, then that is how care arrangements will need to operate. [Vanessa] (and the other children) must be protected from psychological abuse. A parenting order can record such conditions, but it is up to each parent to "walk the talk". Both acknowledge varying degrees of what the children may have witnessed and what they are responsible for. They each lay full blame on the other for what they consider abusive behaviour. A line must be drawn now. Regardless of the outcome of this decision, it is blatantly obvious that if there is no adjustment in terms of adult behaviour, [Vanessa], as Dr Orr predicts, will be forced to choose one parent over the other. That is a grossly unfair decision for her to have to make. It is a decision that she should not have to make if both parents reset their expectations of the other and concentrate solely on parenting her when she is in their care, free from any pressure or guilt about the other parent.

³⁷ Family Violence Act 2018, s 9(2)(c).

[117] It is important to note at this juncture, [Mr Lees]'s position that [Vanessa] will be exposed to psychological abuse if she remains in her mother's care. [Mr Lees] is of the view that because [Dillon] has chosen not to have contact with him, that demonstrates a risk that [Vanessa] will follow the same course if care arrangements are not changed. Further, [Mr Lees] considers that the children's mother has alienated them from him. He says this will occur if [Vanessa] is not in his primary care.

[118] I do not agree with that position. I consider that the parents' contempt of each other, or to use Dr Orr's language "brutal hatred", has effectively created this dynamic. It is perplexing that [Mr Lees], who presents as an intelligent man, lacks insight into how this dynamic and parental hatred of each other has impacted on his children. This situation is not just the making of [Ms Fayen]. I agree that there is a level of influence, which as Dr Orr points out, is unavoidable when considering family dynamics.

[119] Both parents have complete apathy for the other. They have lost the tools to objectively support each child's relationship with the other. [Leah] and [Dillon] respective relationships with each parent is an exemplar of this. [Leah] is aligned with her father. [Dillon] is aligned with his mother. [Mr Lees] is of the view that [Leah] has made up her own mind about her mother. He accepts her views and takes little responsibility for influencing those. He says that she, unlike [Dillon], still wishes to have contact with her mother, therefore that demonstrates that he has been supportive of that relationship and [Leah] has made up her own mind as to how much contact she wishes to have with her mother and that family unit. In contrast, [Mr Lees] considers [Dillon]'s position as being solely due to [Ms Fayen]'s intent and influence to alienate son from father.

[120] As I have acknowledged, the evidence supports there has been some influence (not alienation). I find that there are examples of [Ms Fayen] having some influence over [Dillon] – such as negative talk being done in his presence, which [Dillon] acknowledges, that undermines [Mr Lees]. There are however, other critical factors in play. There are the physical incidents that have occurred between [Dillon] and his father that has had a real impact on [Dillon]. There is evidence of [Dillon] demonstrating his own autonomy by challenging his father's views and not adopting his belief systems, which [Mr Lees] struggles with. There are not the same

comparative examples of [Ms Fayen] and [Leah]’s relationship, which I consider is why that relationship has been maintained. Dr Orr has concluded, and I concur with her views, that [Dillon] has withdrawn from his father, in part, because [Mr Lees] has not respected his son’s views and in some instances, [Dillon] has felt shamed by his father.³⁸ I therefore conclude, that “alienation” does not exist and is not the cause of the breakdown of this relationship. The evidence clearly points to the adults’ views of each other and [Mr Lees]’s dogmatic approach to the primacy of his views, position and opinion.

[121] When assessing this principle, I find that [Vanessa]’s safety can be protected by conditions contained within the parenting order around discipline and exposure to her parents conflict/disparaging comments. I also consider Ms [Vasquez] to be a protective factor. I found her to be focused on the children’s best interests. I found that she expressed her frustrations about the impact of these proceedings on [Mr Lees] in a measured way. While Dr Orr’s report notes the children’s concerns that Ms [Vasquez] may be aligned with [Mr Lees], the impression I got was that she would step in if she felt the need to.

Section 5A

[122] Section 5A provides that family violence is to be taken into account where there has been a temporary protection order or final parenting order.

[123] I simply note this provision. In determining the outcome of these proceedings, I have made findings of fact with respect to family violence, as well as addressed the impact of this in relation to s 5(a) of the COCA.

Section 5(b)

[124] [Vanessa]’s care, development and upbringing should be primarily the responsibility of her parents.

³⁸ BOE, bundle 1, p 206, para 78 and NOE, p 24, lines 16-20.

[125] Both [Ms Fayen] and [Mr Lees] have been fully engaged in their roles as parents. During periods of the children's lives, care has been shared and has worked well.

[126] When this principle is assessed, the outcome is that [Vanessa] will ultimately be cared for by her parents. There is no suggestion that she be raised by anyone else, although the close involvement of each party's respective partner and extended family, is accepted.

Section 5(c)

[127] Section 5(c) provides that [Vanessa]'s care, development and upbringing should be facilitated by ongoing consultation and cooperation between her parents.

[128] This principle is premised on the fact that the only way in which a child's wellbeing can be enhanced is by his or her parents is by way of them consulting and cooperating with one another. In this case, consultation and cooperation has been a real challenge for the parties. Communication has been mostly fraught with issues and at times, non-existent. The same can be said for consultation. This impacts on the parties' ability to cooperate.

[129] There have certainly been examples of times that I consider [Mr Lees]'s interactions (such as emails) have been intense. [Mr Lees] said in evidence that these examples are a "mischaracterisation" of who he is and that the examples do not provide context of the conversation and that he feels that there has been a "crusade" against him.³⁹ It seems that he defaults to this type of communication at times. I would hope by now that he understands that this type of correspondence does not produce the results he seeks.

[130] Likewise, I consider there are examples of [Ms Fayen] not communicating or cooperating that has had a direct impact on [Vanessa]. The time around her birthday is one such example, where [Vanessa] missed a party at her father's home. There was a "stand off" - no cooperation, so [Vanessa] missed out. [Ms Fayen]'s evidence is that

³⁹ NOE, p 327, lines 15-20.

it gets to a point where she has had enough of [Mr Lees] “controlling her”. On this occasion I find that [Ms Fayen] was not child focused nor was she cooperating.

[131] [Ms Fayen] did not consult with [Mr Lees] around vaccinations. [Ms Fayen] wanted [Vanessa] and [Dillon] to be vaccinated. [Mr Lees] did not and advised her of that. What I take from the evidence is that because [Mr Lees] did not come back to [Ms Fayen]’s lawyer with his reasons as to why he did not agree to vaccination, [Ms Fayen] proceeded to have both children vaccinated. In oral evidence she says that [Leah] was vaccinated, but that is quite different given her age. The point is that this provides an example of [Ms Fayen] making a guardianship decision without proper consultation. This must change. If it does not, then conflict will arise again.

[132] Both parents must improve their communication in order to ensure that decisions made for the children are done so by way of consultation. I would suggest that the parties adopt a business-like approach in this regard.

[133] In order to address the issues of consultation and cooperation, both parents agree to use OurFamilyWizard with the Tone Meter. [Mr Lees] suggests that his partner may also be able to support him and could take over responsibility for communication if that made things easier. [Mr Lees] also suggests that email could be used for more complex exchanges, such as medical, school and sports information with the parent raising a query using OurFamilyWizard to flag that an email will be sent.

Section 5(d)

[134] Section 5(d) provides that [Vanessa] should have continuity in her care, development and upbringing.

[135] While the Court generally supports continuity and care for children, the current arrangement, whereby [Mr Lees] exercises supervised contact with [Vanessa] is not sustainable, nor in my view, required.

[136] [Vanessa] wishes to spend more time with her father. [Ms Fayen] acknowledges that and agrees to unsupervised contact but with some reservations.

Lawyer for child is supportive of [Vanessa]’s care arrangements progressing but with protective measures being put in place.

[137] The crux of this principle is whether [Vanessa] remaining in her mother’s day-to-day care, thus continuing that arrangement, is in [Vanessa]’s best interests. I find that it is.

[138] I do not agree that [Vanessa]’s welfare and best interests will be met by being in her father’s primary day-to-day care with [Ms Fayen] exercising some form of supervised/parental therapy arrangement. That does not meet [Vanessa]’s needs.

[139] I have already discussed my views around [Mr Lees]’s position that [Ms Fayen] has alienated the children from him. I do not find this to be the case, therefore I cannot conclude that a complete swap of day-to-day care is required. Further, I consider Dr Orr’s comments around the children being in [Mr Lees]’s care. Dr Orr notes that “[Mr Lees] would have ‘won’ and been vindicated”.⁴⁰ Dr Orr further reported that while [Vanessa] may accept that arrangement, the loss of her mother’s care would constitute a further adverse childhood experience and grief for her, which would impact on her long term psychological welfare.⁴¹ That finding and the evidence does not support [Mr Lees]’s position.

[140] [Vanessa] is entitled to, and deserves, both parents in her life. A form of shared-care arrangement will provide this. The parties will need to parallel parent, and as Dr Orr has suggested, this arrangement will require [Mr Lees] to improve his empathy and attunement, as well as reduce his psychologically confronting disciplinary technique. [Ms Fayen] will need to manage the undercurrents in her home environment. A shared-care arrangement will be successful if both parties work within their own family unit and have no expectation of the other, except for strict compliance of the parenting order. That arrangement in my mind, will address s 4 of the COCA, as well as take into account [Vanessa]’s wishes.

⁴⁰ BOE, bundle 1, p 210, para 93.

⁴¹ Ibid.

Section 5(e)

[141] The principles in s 5(e) provides that [Vanessa] should continue to have a relationship with both of her parents and that her relationship with her family group should be preserved and strengthened.

[142] A shared-care arrangement will allow for [Vanessa] to have a relationship with both of her parents, thus preserving and strengthening her relationship with her maternal and paternal family groups. It is vitally important that both parents support [Vanessa] in terms of her relationship with their respective maternal/paternal families. I am sure each party is aware of how important other family members are to [Vanessa]. It is therefore critical that [Vanessa] is not exposed to derogatory comments about the other parent or that parent's family. [Mr Lees] and [Ms Fayen] have a duty and responsibility to nurture those relationships. I note too that a shared-care arrangement will enable [Vanessa] to not only continue a close and loving relationship with each parent but will also enable her to spend important sibling time with [Leah], [Dillon] and [Dale].

Section 5(f)

[143] Section 5(f) provides that [Vanessa]'s identity should be preserved and strengthened.

[144] A shared-care arrangement as opposed to an arrangement that sees [Vanessa] in one parent's sole care and with limited and restricted contact does not enable [Vanessa]'s identity to be preserved and strengthened. Both parents have a lot to offer [Vanessa]. If she was in her father's care, then she would not have the opportunities that a shared-care arrangement would allow for her to strengthen and develop her understanding of her mother's culture. The reverse is true if she was in her mother's primary care.

[145] The wording of s 5(f) includes, "without limitation", a reference to [Vanessa]'s culture, language and religious denomination and practice.

[146] I also consider it is important to acknowledge that as [Vanessa] grows, her “identity” will include her thoughts, views and opinions.

[147] [Mr Lees] has demonstrated a lack of understanding in this regard for [Dillon]. While I acknowledge that he will not accept this statement, because he fundamentally believes his relationship with his son has deteriorated because of [Ms Fayen], I believe it is important to highlight this principle. As Dr Orr has observed, the developmental age and stage of children, includes them striving for autonomy. They will not always agree with their parents – that is natural and displays positive qualities, like confidence and free will. [Vanessa]’s views are important and will no doubt grow. I hope [Mr Lees] will embrace this, even if [Vanessa]’s views differ from him and may align with her mother.

Outcome

[148] When I consider the s 5 principles, as well as what meets [Vanessa]’s best interest and welfare (s 4) and taking into account her views and wishes (s 6), I consider that [Vanessa]’s care shall be shared between her parents.

[149] The parenting order is to record a shared-care arrangement and is not to use the terms day-to-day and contact, which in my mind, particularly for this matter, infers one parent has more authority over a child than the other.

[150] The shared care arrangement will be on a 5/9 basis. I do not make an equal shared arrangement. I hold residual concerns around [Mr Lees]’s ability to keep communications focused solely on [Vanessa] and it not expanding to his belief that [Ms Fayen] has alienated him from the children. The 5/9 arrangement will still provide [Vanessa] quality time with her father, which enables [Mr Lees] to be involved in schooling and extracurricular activities.

[151] The parenting order is to be recorded as follows:

- (a) [Dillon] shall live with [Ms Fayen]. He is to be actively encouraged and supported to pursue his relationship with [Mr Lees], and have

contact on special occasions, but on the basis that contact (either face-to-face or indirect) is at his discretion.

- (b) [Vanessa] is to be in the shared-care of [Ms Fayen] and [Mr Lees].
- (c) [Vanessa] shall be in [Mr Lees]'s care on alternate weeks from Thursday afterschool until Monday at 3 pm.
- (d) During the school holidays, [Vanessa] shall be in [Mr Lees]'s care from the Thursday that is his usual period of care until 3 pm the following Thursday (being one half of the school term holidays).
- (e) During the summer holiday period, [Vanessa] will be in [Mr Lees]'s care for a seven day period commencing at 3 pm on the first Thursday after Boxing Day (or from Boxing Day if it is a Thursday) when she would normally be in his care pursuant to the alternate week arrangement, until 3 pm the following Thursday, at which time the usual alternate week arrangement shall resume.
- (f) [Vanessa] may also be in [Mr Lees]'s care for a further period of up to seven days, commencing on a Thursday that she would normally be in his care, to the following Thursday, provided that [Mr Lees] gives notice to [Ms Fayen], no later than 1 December each year of his intent to have [Vanessa] for that period. Thereafter the usual alternate week arrangement shall resume.
- (g) At all other times, other than the Christmas period as provided at (h) below, [Vanessa] shall be in the care of [Ms Fayen].

Christmas

- (h) Christmas shall be alternated each year. In 2022, and in even numbered years thereafter, [Vanessa] shall be in the care of [Mr Lees] from 5 pm Christmas Eve until 11 am Christmas Day and in the care of [Ms Fayen] from 11 am on Christmas Day until 5 pm on Boxing Day. Thereafter, the usual care arrangements shall continue. The reverse shall apply for Christmas Eve-Boxing Day in odd numbered years.

Changeovers

- (i) Changeovers shall take place at school on any school day. When changeover does not occur on a school day, changeover shall take place at [location deleted] carpark with both parents remaining in their respective cars when [Vanessa] transfers to the other vehicle.

Birthdays

- (j) [Vanessa]'s birthday shall lie where it falls. The non-care parent shall have contact with her by way of telephone/social media on the morning of her birthday prior to school or prior to 9 am on that day. All other birthday arrangements are to be done in each party's own time, when [Vanessa] is in their care.

Father's Day/Mother's Day

- (k) Should [Vanessa] be in her father's care on Mother's Day, [Ms Fayen] can exercise a telephone/social media call with her.
- (l) Should [Vanessa] be in her mother on Father's Day, [Mr Lees] can exercise a telephone/social media call with her.
- (m) Should [Vanessa] express a desire to spend the Sunday morning with the other parent on either Father's Day/Mother's Day, that should be facilitated through OurFamilyWizard one week prior, but on the basis that such time will not be made up.

Telephone calls

- (n) When [Vanessa] is in her mother's care, she can freely contact her father.
- (o) When [Vanessa] is in her father's care, she can freely contact her mother.

OurFamilyWizard

- (p) Both parties agree that they will utilise the OurFamilyWizard app, including the Tone Meter. The parties shall meet the cost of the premium package, which includes the Tone Meter, on an ongoing basis.
- (q) The parties will ensure that their communication is child focused and timely. Guardianship matters are to be addressed using the OurFamilyWizard app. If an issue arises, the parent who raises the concern shall identify the guardianship issue, their position and solution is and the (reasonable) timeframe they seek for a response. The responding party is to respond in the timeframe provided.

Conditions

- (r) Each parent can attend extracurricular activities, school events or other similar events in which the children are involved. Each parent will keep a respectful distance from the other and shall not approach or interact with the other parent.
- (s) [Vanessa] shall not be enrolled in any additional extracurricular activities without consultation and agreement between the parties, which is to be confirmed in writing via OurFamilyWizard.
- (t) Neither party nor any caregiver shall use physical discipline.
- (u) Neither parent nor caregiver shall engage in or alert to, negative or disparaging comments in respect of the other parent, their partner or extended family.
- (v) The parties and their partners shall be proactive in terms of support and encouragement in regards the relationship with the other parent.
- (w) Both parties will ensure that [Vanessa] attend any extracurricular activities in a consistent and timely fashion and that she has all times required for that activity.

- (x) Both parties will ensure that [Vanessa] has all necessary items in their possession on the day of handover or that such items are exchanged between the parents by delivery to a mutually agreed address, in a time sensitive manner.
- (y) In an emergency, each party shall contact the other, or alternatively, nominate an adult to contact the other party.

Other orders and directions

[152] Ms Webb is directed to file a draft order in Court for sealing.

[153] The variation order dated 15 October 2021, is discharged.

[154] On 5 October 2021, [Ms Fayen] made an application for costs. I am unaware whether that application, which is with respect to the without notice application for warrant, has been dealt with. If not, submissions should be filed in 21 days as to costs sought, with [Mr Lees] having 21 days to respond.

[155] In regards s 135A costs contribution orders, any party who is not in receipt of legal aid is to file submissions in the usual way.

Judge KNP Broughton
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 27/10/2022