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

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

IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2022-070-000606
[2023] NZFC 9373

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[STEPHANIE MONROE] Applicant
AND	[ANDREW MONROE] Respondent

Hearing:	30 August 2023
Appearances:	S Brown for the Applicant Respondent appears in Person C Andrews as Counsel to Assist T Bartlett as Lawyer for the Child
Judgment:	1 September 2023

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO PARENTING ORDER (S 47) AND DISPUTE BETWEEN GUARDIANS (S 46R)]

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[1] Mr and Ms [Monroe] are the parents of [Petr Monroe], who was born on [date deleted] 2013. Following the parties' separation, [Petr] has remained in the day-to-day care of Ms [Monroe]. He currently has supervised contact with his father. Mr [Monroe] however seeks to have unsupervised contact with [Petr].

[2] [Petr] is currently home schooled by Ms [Monroe]. While that was initially with Mr [Monroe]'s consent, he has now withdrawn that consent, and seeks an order requiring [Petr] to attend a State school, and preferably [School 1], being the school he had previously attended. Mr [Monroe] had also sought an order from the Court preventing [Petr] being removed from New Zealand. Ms [Monroe] is [from central Europe] and had indicated that she wished to be able to take [Petr] back to [her home country] to meet his maternal family, and to foster [Petr]'s [maternal cultural] identity. I was advised at the start of the hearing that that application could be withdrawn on the basis the parties have reached an agreement for up to six weeks a year provided Mr [Monroe] is given details of the trip, including copies of return airfares, in advance.

[3] Therefore, the issues that I need to determine are:

(a) Whether [Petr]'s contact with his father should continue to be supervised, or whether it can move to unsupervised contact.

(b) Whether [Petr] can continue to be home schooled by his mother, or whether he is to attend [School 1].

The Law

[4] Given that both applications fall for consideration under the Care of Children Act 2004, I am required to have as my first and paramount consideration the welfare and best interests of [Petr]. I need to recognise that [Petr] is a unique child in a unique family and thus I cannot adopt any formulaic approach.[1] Section 4 requires me to consider the relevant s 5 principles. The Supreme Court in *Kacem v Bashir* has held that I need to identify not only those principles that are relevant, but also those that are

1 *Brown v Argyll* [2006] NZFLR 705, (2006) 25 FRNZ 383.

irrelevant and to explain why.[2] On the facts of this case all of the s 5 principles are relevant and need to be considered by me.

[5] Pursuant to s 6 of the Care of Children Act [Petr] is required to have been given reasonable opportunities to express views about the issues that are before the Court. He has had those opportunities through his meetings with his Court appointed lawyer, Mrs Bartlett. While she did not file a report setting out those updated views prior to the hearing, at the hearing she set out [Petr]'s most recent views, having met with him prior to the hearing. [Petr] is clearly missing his father and wants to see him more than he is at present. [Petr] had no clear views in relation to his schooling. His view is that he has no particular preference as between the two options, and simply wants his parents to make a decision, or if they cannot, for the Court to make a decision.

[6] Given [Petr]'s age, his views need to be given significant weight by me. In terms of the *C v S* decision, it is my determination that he is of an age and maturity in which his views should be afforded significant weight.[3] He did not express any clear views or concerns around his safety in his father's care.

Section 5A

[7] Section 5A must be considered by me given the existence of the Final Protection Order. Ms [Monroe] initially made an application for a Protection Order on 18 October 2022. While the application was made without notice, it was directed to proceed on notice. Judge Lindsay recorded in her eDuty minute:

> The respondent's text messaging to the applicant is gratuitous, self-indulgent, unwanted and psychologically abusive. Should the respondent assume that because he has communicated with the applicant in this manner now for years then he is wrong because the contents of his messaging are abusive and unacceptable. If the respondent continues to engage in text messaging or social media messaging or phone calls in a similar vein, he is on notice that a without notice application may well result in a Temporary Protection Order being made. However, the applicant may well block him, but the applicant's evidence reflects she has not already because the parenting relationship requires some lines of communication between them. The content and frequency of the respondent's messaging to the applicant is offensive – if the Act enabled me to direct the respondent attend anger management I would

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2 *K v B* [2011] 2 NZLR 1, [2010] NZFLR 884, (2010) 28 FRNZ 483 (SCNZ).
3 *C v S* [2006] 3 NZLR 420.

> have done so but as an alternative I encourage the respondent to voluntarily attend a programme.

[8] Ms [Monroe] subsequently reapplied, again without notice, for a Protection Order. That application was considered by Judge MacKenzie, who granted the Protection Order. The reasoning provided by her Honour was that:

> When the earlier application was placed on notice by Judge Lindsay, she made it very clear to the respondent the nature of the consequences if further texts were sent in a similar vein to those referred to in the applicant's affidavit. The respondent was therefore clearly on notice when he sent the text complained of after receipt of the earlier application. It appears that the respondent may be experiencing some personal crisis as there are no other explanations for the repeated conduct and explicit threats. The applicant is vulnerable, and alone and is fearful of physical assault from the respondent. The Temporary Protection Order was made final on 20 January 2023.

[9] Those comments are important to record; for as I will set out below, the manner in which Mr [Monroe] continues to engage, and his attitudes, show that he still has no insight of the effect of his ongoing violence both on Ms [Monroe] and on [Petr].

Section 5(g) Principle

[10] Section 5(g) came into effect on 16 August 2023. It is a new provision in COCA which provides that:

> A child must be given reasonable opportunities to participate in any decision affecting them.

[11] Similar to s 5(a), s 5(g) includes the word "must" and thus it is a mandatory principle requiring consideration by the Court. The issue that arises is what is meant by the words "to participate". It cannot mean literally that children get to participate in the actual decision-making process; that is a judicial function.

[12] Notwithstanding that it had not come into force at the time, reference to the s 5(g) principle is made by the Court of Appeal in *Newton v Family Court at Auckland* at [34] to [35].[4] The insertion of s 5(g) occurred pursuant to The Family Court (Supporting Children in Court) Legislation Act 2021. The Court of Appeal accepted the submissions of counsel that that Act:

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4 *Newton v Family Court at Auckland* [2022] 3 NZLR 846, [2022] NZFLR 846, [2022] NZCA 207.

> Confirms the "direction of travel" in relation to ascertaining children's views in proceedings that affect them.[5]

[13] As the Court of Appeal set out, The Family Court (Supporting Children in Court) Legislation Act 2021 also amended s 6 of COCA by inserting a new subsection (1AAA) as follows:

> (1AAA) The purpose of this section is to implement in New Zealand Article 12 of the United Nations Convention on the Rights of the Child.

[14] That Act also inserted a new s 7AA which requires a lawyer:

> …appointed under section 7 to represent a child must, if it is reasonably practicable to do so having regard to the age and maturity of the child, explain the nature of the proceedings to the child in a manner that the child is most likely to understand.

[15] Article 12 of UNCROC provides:

> **Article 12**
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

[16] Section 5(g), therefore, needs to be interpreted in light of the other amendments to COCA made contemporaneously by The Family Court (Supporting Children in Court) Legislation Act 2021. Section 5(g), through the use of the word "participate" expresses an intention that children must be given reasonable opportunities to be involved in the proceedings to the extent that they must be given an opportunity, as is required in s 6, and in Article 12 of UNCROC, to express their views to the Court. Those views can be expressed directly to a Judge at a judicial interview/meeting with the children or through their Court appointed counsel.

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5 *Newton v Family Court at Auckland* at [34].

[17] Significantly, with the amendment to s 6 and its reference to UNCROC, there can be no doubt that the views of the children need to be considered in light of their age and maturity. That is the position, as I have set out above, set out by the High Court in *C v S*. I am aware, however, that some academics have argued that because s 6 did not specifically reference "age and maturity" factors, the views of all children needed to be considered and taken into account.[6] That view is clearly not the case given the express reference to Article 12 of UNCROC in COCA.

[18] However, I do not accept that the use of the word "participate" includes an intention by Parliament that children should come to Court and express their views directly to the Court during a hearing. There is, as anyone well experienced in family law would know, a wealth of research that indicates for children in high conflict families their overt and continued involvement in that conflict is psychologically damaging for them. To expect a child in a high conflict situation to have to come to Court, and in front of their parents, express a view which is contrary to the views of one of their parents, would be placing that child in an intolerable situation. It would be psychologically abusive and damaging of them if that was what was required by the Court so as to give effect to "participation" and would be contrary to empirical and peer reviewed international research.

[19] Children's participation is further enhanced through the insertion of s 7AA which places mandatory obligations on lawyer for the children, taking into account a particular child's age and maturity, to explain the nature of the proceedings in a child-focused and easily understood manner. Section 5(g) therefore enhances the s 6 and s 7AA obligations but does not require active participation in the hearing itself. Indeed, as affirmed by the Court of Appeal in the *Newton* decision, children are not parties to the proceedings and they do not have a right of standing. In this case [Petr] has had opportunities to participate through his meetings with Mrs Bartlett and his being able to set out his views in relation to the issues before the Court.[7] His participation will be further enhanced by Mrs Bartlett meeting with him to advise of the outcome of this hearing on the release of this judgment.

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6 Professor Heneghan for example in his address, "Rethinking Law's Families in Aotearoa New Zealand", at the International Society of Family Law's conference, *Rethinking Law's Families and Family Law*, University of Antwerp, Antwerp, Belgium, 12–15 July 2023.

7 As is required pursuant to the *Carpenter v Armstrong* decision.

The Other Section 5 Principles

[20] Sections 5(b) and (c) provide for [Petr] to be primarily in the care of his parents, and for his parents to be involved in all decisions affecting his care, development and upbringing. There is no dispute that [Petr] is to remain in the care of his mother, and that he should see his father. I accept, as argued by Mr [Monroe], that he has been effectively shut out of decisions in relation to [Petr]'s care, development and upbringing. It is clear that Ms [Monroe] has made and continues to make unilateral guardianship decisions, in breach of her obligations under s 16(5) of the Care of Children Act. For example, she has not provided Mr [Monroe] with regular updates as to how [Petr] is progressing in his education, and in relation to the extracurricular activities that he is involved in.

[21] However, Ms [Monroe]'s reluctance to have direct dialogue with Mr [Monroe] is understandable. She has a Final Protection Order against him. His method of communication is at times abusive and intimidating. Thus, whilst it was suggested to her in cross-examination that she could perhaps allow Mr [Monroe] to ring and talk with [Petr], and to talk with her about guardianship issues, given the manner in which Mr [Monroe] has communicated with her in the past, I accept her reluctance to have any form of verbal communication with Mr [Monroe]. She has agreed to regularly post updates to Mr [Monroe].

[22] There is, at law, a clear tension between s 16(5) which places mandatory obligations on parents and guardians to consult, and their rights as protected persons pursuant to a Protection Order. I acknowledge that the Protection Order allows Ms [Monroe] to give permission for Mr [Monroe] to have communications with her. That could include communications about guardianship issues. The Protection Order additionally affords to Ms [Monroe] protection in that if Mr [Monroe]'s communication around guardianship issues crosses the line into behaviour that would amount to family violence, including psychological abuse, then she can cease the conversation and lodge a complainant with the police. However, in order to get to that position she has to have first put herself in a position whereby communication is occurring, and for some victims of violence, such as Ms [Monroe], that is an intolerable position to put themselves in. In effect it would require Ms [Monroe] to

always place herself at the potential risk of harm given the patterns of abusive behaviour by Mr [Monroe] towards her in the past. Ms [Monroe] posting information to Mr [Monroe] is probably the best that can be achieved given the abusive manner in which Mr [Monroe] continues to communicate.

[23] Section 5(d) provides for continuity and care. That is not in dispute on the facts of this case. Sections 5(d) and (e) provide for [Petr]'s relationships with his parents and his wider family group to be preserved and strengthened. [Petr]'s ability to maintain relationships with his paternal family and his maternal family are important factors that I need to consider in this case, and I give s 5(e) in particular significant weight. Section 5(f) provides for [Petr]'s identity, including his cultural identity, to be preserved and strengthened. That is a particularly relevant principle given the s 46R application, and Ms [Monroe]'s desire to take [Petr] to [his mother's home country] to meet his [maternal] family. Additionally, Mr [Monroe] is Tongan and thus [Petr]'s whakapapa is [details deleted], and he needs an opportunity to develop his cultural identity. This is again a principle that I give significant weight to.

[24] Section 5(a) requires [Petr] to be protected from all forms of violence. Section 5(a) specifically defines violence as that defined in ss 9(2), 10 and 11 of the Family Violence Act 2018. This is a principle that I need to give careful consideration to on the facts of this case.

[25] Ms Brown, in cross-examination, put to Mr [Monroe] some of the content of his text messages. For example, she put to him that he had referenced Ms [Monroe] as a "cunt" 45 times. That he had referred to her as a "scank", a "prostitute", a "whore", a "parasite", a "fuckin Jew" and a 'round-head". Mr [Monroe] accepted the messages were unacceptable, yet in his answers continued to justify why he referred to Ms [Monroe] in that manner. It is clear that he remains bitter and angry at the end of their relationship, notwithstanding that they separated a long time ago. Mr [Monroe]'s explanation for communicating in this manner was that:

> I have always been direct – that can be seen as aggressive – I have always been like that from day one.

[26] He has completed and attended a Stopping Violence programme but appears to have learnt nothing from it.

[27] Mr [Monroe] had been having supervised contact at Kidzkare. There are two incidents of particular concern set out in the supervisor's contact report. On the visit that occurred on 22 May 2023 the contact supervisor recorded:

> [Mr [Monroe]] arrives with dog, knocks on the back door. [[Petr]] was excited to see them both and ran outside to play. [Mr [Monroe]] helped [[Petr]] train the dog. [Mr [Monroe]] verbally aggressive physically and verbally while training the dog, this appeared to frighten [[Petr]] and his body language becomes closed off. Telling [[Petr]] to "boot" the dog, when [Mr [Monroe]] was confronted by a [Kidzkare supervisor] he became defensive and annoyed by this. [Mr [Monroe]] told [[Petr]] that not everyone thinks the same about these things, and suggested they go across the street to the park. [[Petr]] tries to be stern with the dog. At the park [Mr [Monroe]] changes his approach in helping [[Petr]] train the dog, and appears more gentle and less at yelling.

[28] The notes go on to record that whilst the interactions were around the dog, [Petr] was becoming uncomfortable, and the supervisor suggested that Mr [Monroe] tie the dog up. The dog was eventually tied up by Mr [Monroe] with the notes then recording:

> The dog became distressed, [Mr [Monroe]] became increasingly annoyed, "You're pushing it mutt", "Any bullshit and you're gonna find out the hard way." [Mr [Monroe]] yelled at the dog, "Shut up!" and hit and kicked her repeatedly…the dog continued to yelp, [Mr [Monroe]] got back up and punched the dog in the mouth. [[Petr]] didn't say anything and looked away. [Kidzkare supervisor] told him to stop…he got back up to hit the dog, [supervisor] intervened, requesting him to stop hitting the dog.

[29] On the visit on 24 April 2023 the supervisor recorded:

> [Mr [Monroe] and [Petr]] hugged and began to train the dog together, which involved kicking the dog, grabbing its skin and holding its collar with twisting motions. This was aggressive in nature. [Mr [Monroe]'s] language during conversation with [[Petr]] was at times inappropriate, involving talks about war and murder/death against the Māoris and New Zealanders.

[30] The supervisor's notes go on to record:

> [[Petr]'s] body language was stiff and closed while in conversation about the war.

[31] Section 11 of the Family Violence Act 2018 defines psychological abuse as including ill-treatment of household pets.[8] Mr [Monroe] had no insight as to the effects of his violence upon his dog on [Petr], the detrimental harm caused to [Petr] by involving [Petr] in inappropriate discussions and appeared to be unable to read [Petr]'s body language when he was feeling uncomfortable. In cross-examination Mr [Monroe] justified his actions, appeared entirely unrepentant. He exhibited no empathy for [Petr] (or indeed Ms [Monroe]), and I was left with an overwhelming and stark conclusion that these behaviours will continue. At a time in which Mr [Monroe] had the gaze of the Court upon him, he was unfiltered and unrestrained in his answers.

[32] To his credit he was honest. But I have no confidence that Mr [Monroe] has any desire or inclination to change how he talks, to change the way in which he treats his pets, and to change the way in which he interacts and talks to [Petr]. There are very real risks that [Petr] will continue to be exposed to ongoing psychological abuse in his contact with Mr [Monroe]. Significantly, this has occurred during supervision. The risks for [Petr] must be even higher if there is no supervisor present. Section 5(a) is a principle that I give significant weight to.

Discussion

[33] Mr [Monroe]'s position was quite clear. He does not believe he needs supervision and if further supervision is directed, then he will simply have no contact with [Petr]. Ms [Monroe] attended Court with a support person. He was offered as a potential supervisor, but Mr [Monroe] would not entertain the idea of anyone providing supervision. He wants contact to revert to regular weekend contact, and even suggested that Ms [Monroe] could drop [Petr] off at his place at the end of the drive. That demonstrated no empathy for Ms [Monroe] or insight as to how she might feel as a protected person having to visit Mr [Monroe]'s place of residence.

[34] I acknowledge that [Petr] wishes to have more of a relationship with his father than he is at present. It is my determination, however, that it is unsafe for him to have

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8 Section 11(1)(d)(i), FVA 2018.

unsupervised contact with Mr [Monroe] given the matters which led to the making of the Protection Order, the ongoing continuation of psychologically abusive behaviour by Mr [Monroe], and his lack of insight into the effects on [Petr] of his behaviours and means of relating to others around him continuing.

The Result

[35] It is my determination that Mr [Monroe] is to continue to have supervised contact with [Petr] until further order of the Court. I intend to provide a further period of Court funding pursuant to s 60 of COCA. However, funding by the State can only continue for a certain period of time. I would hope that Mr [Monroe] avails himself of some therapeutic assistance so that he can come back to Court and address his contact moving to unsupervised contact once he is able to demonstrate that there has been significant and meaningful change in his life.

Schooling Issue

[36] On the face of it [Petr] is thriving being home schooled. His mother uses the Accelerated Christian Education (ACE) programme. It involves working through a series of workbooks, at the end of which there is a test, marked by Ms [Monroe], and moderated by ACE NZ. In relation to those tests [Petr] routinely scores in excess of 90 per cent. What is unknown is how the ACE test results measure against national standards.

[37] Ms [Monroe]'s explanation for home schooling [Petr] was that he was being bullied at [School 1], and despite her efforts to raise the issue with the school, that it was ineffectual in resolving the bullying problem. Mr [Monroe]'s response to that was in effect that [Petr] should "tough it out" and that it was important that he learnt that life was not fair and how to be resilient in life. Ms [Monroe] has [Petr] involved in a number of extracurricular activities, and there are regular social meetings with other home schooled children. [Petr] was, as I have set out above, ambivalent as to whether he would go back to [School 1] or remain home schooled. He simply wanted a decision to be made. I simply do not have enough information to conclude whether the ACE programme is enabling [Petr] to meet the national standards for his age group.

I have no information on its curriculum; for example, I do not know if the ACE programme includes exploration of te ao Māori and New Zealand history, as is now required by the new national standards.

[38] However, I have no evidence that [Petr] being home schooled is contrary to his welfare and best interests, and I have no evidence to enable me to conclude that home schooling would be less advantages for [Petr] than mainstream education. Given that [Petr] is ambivalent as to outcome and given that on the face of it he is doing well in his schooling at present, I can see no reason to change the status quo arrangement and it is my decision that [Petr] can continue to be home schooled. [Petr] continuing to be home schooled is in his best interests and welfare at this point in time.

Orders

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

(a) The s 77 application seeking an order preventing [Petr] being removed from New Zealand is discontinued by consent.

(b) I make a Final Parenting Order in relation to [Petr] in the following terms:

(i) [Petr] is to be in the day-to-day care of Ms [Monroe].

(ii) [Petr] is to have supervised contact with Mr [Monroe] as follows:

(1) At a Court approved supervised access centre.

(2) Supervised by such other person or persons as the parties can from time to time agree.

(iii) Pursuant to s 60 of the Care of Children Act I direct the Court is to fund a further 12 sessions of supervised contact. Thereafter, Mr [Monroe] will need to fund the sessions himself.

(c) The above Parenting Order is conditional on the following:

(i) During the periods in which [Petr] has supervised contact with Mr [Monroe]:

(1) Mr [Monroe] is to not bring any pets, including his dog.

(2) Mr [Monroe] is to not discuss in any demeaning, diminishing or derogatory way Ms [Monroe], and nor is he to involve [Petr] in discussion about adult issues.

(ii) Ms [Monroe], by agreement, will be allowed to take [Petr] overseas for up to six weeks each year provided that:

(1) She gives prior notice of her intention to take [Petr] overseas.

(2) She provides Mr [Monroe] with an itinerary.

(3) She provides Mr [Monroe] with proof of return air tickets.

(d) By consent I record the parties' agreement that New Zealand is the habitual country of residence of [Petr].

[40] This being the end of the proceedings Mrs Bartlett's appointment as lawyer for [Petr] is terminated with the thanks of the Court. Her appointment is to terminate in 14 days' time enabling her to meet with [Petr] and to explain to him this decision and the reasons why I have made the orders that have been made.

[41] I decline to make a cost contribution order against either party.

[42] All matters are therefore at an end and the file can now be closed.

S J Coyle
Family Court Judge

Signed this 1st day of September 2023 at am / pm