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[SQUARE BRACKETS]

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**IN THE FAMILY COURT
AT [DISTRICT COURT]**

**I TE KŌTI WHĀNAU
KI [TE REO TRANSLATION OF LOCATION]**

**FAM-2019-087-000162
[2023] NZFC 2975**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN [MALLORY DRAKE]
 Applicant

AND [DEREK DRAKE]
 Respondent

Hearing: 27, 28, 29 and 30 March 2023

Appearances: S Jefferson KC for the Applicant
 Respondent is Self-represented
 C Gelston as Lawyer for the Child.

Judgment: 11 April 2023

RESERVED JUDGMENT OF JUDGE A S GREIG

Introduction – the issues

[1] [Jethro Drake], known as [Jethro], was born on [date deleted] 2014. His mother, [Mallory Drake], is a [country deleted] born [profession deleted] who lives and works in [town A]. His father, [Derek Drake], is an [country deleted] born [profession deleted] who lives and works in [town B].

[2] [Jethro] currently lives with his mother. [Ms Drake] wants to maintain that arrangement. Mr [Drake] wants [Jethro] to come and live with him in [town B]. That then is the principal issue that I must decide; what are the best care and contact arrangements for [Jethro].

[3] There is a secondary issue, Mr [Drake] alleges that [Ms Drake] has breached the parenting order and has applied for her to be admonished.

Relevant background

[4] The parents met in New Zealand in 2009, they started living together the following year and married in 2012.

[5] The parents were living in [town A] when [Jethro] was born in [2014]. [Ms Drake] returned to work when [Jethro] was about three months old but her contract as a [profession deleted] in [town A] was temporary. It ended in about September 2015. [Ms Drake] then took up a position as a [profession deleted] in [town B].

[6] In December 2018 [Ms Drake] moved back to [town A]. She had burnt out in [town B]. She had taken on the position as the [detail deleted] in the [department deleted] in [town B] and found the two demanding jobs she had, that of being a mother and the head of the [department deleted] in [town B], to be too much.

[7] There is a dispute as to how much of the workload in caring for [Jethro] Mr [Drake] was undertaking at that time. [Ms Drake], in subsequent affidavits, was critical of the support she received from Mr [Drake] whom she describes as not supporting her “in any practical or emotional way”.¹

[8] Whilst Mr [Drake] did look after [Jethro] whilst [Ms Drake] at work, it appears that once [Ms Drake] was at home Mr [Drake] often made himself busy with activities outside the home.

¹ Agreed bundle, page 13, paragraph 12.

[9] Mr [Drake] is a [profession deleted]. He loves the environment around [town B] and had started a [business] there. He also joined the [organisation deleted]. He also attended Te Reo classes which kept him busy two nights a week, plus a number of weekends.

[10] As a result of all of this [Ms Drake] moved back to [town A] in December 2018. She had been offered a temporary position as a [profession deleted] in [town A], a [department] that she found much more congenial than the one in [town B], due principally to the working conditions as well as other professional opportunities that [town A] offered. She very quickly purchased a house in [town A], thus clearly indicating that she was not intending to return to [town B].

[11] It is clear that at that point both parties still regarded themselves as married to each other. [Ms Drake] was also equally clear that there had to be changes. She needed more support with [Jethro] when she was not at work. The parties attempted counselling. Mr [Drake] oscillated between [town A] and [town B]. His understanding at that time was that [Ms Drake]'s position in [town B] was being kept open for her and that the [town A] position was only temporary. It is also clear that, for [Ms Drake], Mr [Drake] was going to have to move to [town A]. She had no intention of returning to [town B].

[12] During the ensuing months it became clear that the gulf between the two was unbridgeable. In affidavit dated 16 December 2022 Mr [Drake] annexed a series of text messages between the two starting in February 2019. The messages in February 2019 are loving and largely seem to be exchanges between them at times when Mr [Drake] was looking after [Jethro] whilst [Ms Drake] was at work. Late in the afternoon on 2 March, for example, Mr [Drake] texted [Ms Drake], trying to find out when she might be home. [Ms Drake] replied:

[Ms Drake]: Yum! Where are you now? Mummy at [details deleted], hopefully I can escape after [three fingers crossed emojis].

Mr [Drake]: Corner shop on [street name deleted]. Shall we go home or meet somewhere.

[Ms Drake]: Go and enjoy yourself [smiley face emoji] waiting for things to get ready for baby to come out – I'll call/text before I come? What do the boys want for dinner??

[13] There are similar messages in early March, some of them loving, some of them exhibiting tension. For example on 4 March Mr [Drake] texts [Ms Drake] to advise that he is:

Mr [Drake]: Going for a walky now up at [details deleted]. Tired of fighting and just want some relaxed time with us all together. Happy to stay somewhere else if it is easier for you.

[Ms Drake]: On call until 2mrw afternoon, then a night off [winking emoji] then on call again.

Mr [Drake]: Ok. Daddy and [Jethro] can cook pastas for dinner tonight. Mummy can think what she might like to do after worky tomorrow.

[Ms Drake]: Nice [three smiley face emojis one emoji with hearts].

[14] Later that day [Ms Drake] texted to advise that she wouldn't be home before 5 pm and for Mr [Drake] to cuddle [Jethro].

[15] Messages continued through that period, co-operative and loving texts with Mr [Drake] telling [Ms Drake] what he and [Jethro] were up to and [Ms Drake] sending back both loving messages and also advice about her work arrangements.

[16] The messages early in the day on 30 March follow a similar pattern, then suddenly there is the following exchange starting at 5.09 pm:

Mr [Drake]: There's going to be pizza here if you want to come over. They have friends round for beers too [smiley face emoji].

[Ms Drake]: (5.11 pm) Good for you.

[Ms Drake]: (5.25 pm) We live on different planets I think [puzzle face emoji]. I'm up all night & day with a [details deleted] and you complain about your lack of sleep, ask when I finish to then have beers & pizzas with friends.. I see us running into divorce and you agree that there are big issues but rather than addressing them you have no words for me.. I get it.

Mr [Drake]: (5.56 pm) Mummy, I know you are tired and it has been a hard night for all of us. I just wanted you to know that you can come and relax here, we would love to have you. I understand too if you want to get some sleep before you go back in. No worries either way.

[Ms Drake]: (6.04 pm) [Derek] you do not get me – do you really think I would go to sleep now? Do you think I could make a happy face & chat to friends whilst talking to the coroner and police to get the [details deleted]? Or could imagine that I might just feel like having a hug of my [Jethro]? [Derek]

I am sorry! You complain about my levels of stress and you continue to show me lack of support – you do not understand. I get it.

[17] This heart-rendering exchange is important to the present day issues for a number of reasons. Mr [Drake] is convinced that he has been the victim of a deception by [Ms Drake]. He believes that she intended to separate at the time she moved away from [town B] back to [town A] at the end of 2018 and that she has done all she can since that time to manipulate issues of care and contact to her advantage.

[18] His sense of grievance is visible in his affidavits and was visible in the courtroom. Mr [Drake] was self-represented and his cross-examination of [Ms Drake], a cross-examination that I had to re-direct to quite a large extent, focused far more on past grievances than issues around [Jethro]'s future.

[19] [Ms Drake], for her part, created through her affidavits and evidence in court the clear impression that she does not have a high opinion of Mr [Drake]. She believes that he is self-indulgent and lazy, concerned more with living his best lifestyle than working hard to support a family financially and emotionally. She believes that Mr [Drake] lacks the practical ability to properly parent [Jethro] and, even more significantly, that [Jethro] is not safe around him.

[20] Mr [Drake] believes that [Ms Drake] is a significant gatekeeper in terms of his relationship with [Jethro], that she is overly protective of him in a way that is harming his relationship with [Jethro].

[21] In May 2019 it was acknowledged that the parents would not be reconciling. Mr [Drake] resumed living full-time in [town B]. The parents could not agree on [Jethro]'s day-to-day care and contact. Family Dispute Resolution was tried but did not work and on 23 August 2019 [Ms Drake] filed an application, on notice, for a parenting order. She proposed that [Jethro] be in her day-to-day care and that Mr [Drake] have contact three weekends each term and for half of all of the holiday periods.

[22] At page 6 of her affidavit of 23 August 2019, when asked a series of questions designed to ascertain the child's safety with the other parent, she declared that:

“I confirm that there are no safety concerns in these proceedings.”² In a second affidavit filed on 8 October 2019 [Ms Drake] also made no mention of having any concerns for [Jethro] in Mr [Drake]’s care.³ There was no mention by her at this stage of there having been any family violence.

[23] Mr [Drake]’s response to [Ms Drake]’s applications was an application for an order that [Jethro] be returned to [town B]. However in January 2020 the parents reached an agreement that provided for [Jethro] to live with [Ms Drake] in [town A] and to have contact with his father in, for the most part, the way already proposed by [Ms Drake]. A final parenting order was made, the file was closed.

[24] In January 2021 there was an incident between [Jethro] and his father during the Christmas holidays in [town B]. [Jethro] alleged that he had been strangled by his father. He underwent an evidential interview with the police. The police concluded that the incident did not meet the threshold required to justify a prosecution. The incident was later the subject of a safety hearing conducted by his Honour Judge D G Smith on 22 October 2021. I do not intend to go through all of the allegations and evidence presented at that hearing. Some significant findings were made however, findings that still resonated through to the hearing that I have just conducted. I quote directly from Judge Smith’s findings:

What I am certain of, to the standard required in this court, is that a confrontation between [Jethro] and his father took place and that his father used physical force to restrain [Jethro]. I think it more likely than not that during that restraint [Jethro]’s neck was touched, whether it can be classified as strangulation is impossible for me to determine. What it does demonstrate is Mr [Drake]’s ability to deal with his son when he is upset needs to improve.

Notwithstanding those comments, I do not think that Mr [Drake] is a danger to his son which should preclude him having contact.

This proceeding has been clouded by the continued animosity between [Jethro]’s parents. It is a continual battle between them. Both parties embellish the “hurts” that they have suffered as the result of the other and this is impacting on [Jethro].

[Jethro] knows his mother’s views of his father and vice versa. [Jethro] will be responding to those views. When relating incidents such as the confrontation with his father, [Jethro] would put it in a way he knows his mother will respond to.

² Agreed bundle, page 6.

³ Agreed bundle, pages 11-19.

[Jethro] is at risk, as I commented at the end of the hearing, from his parents' behaviour. Action needs to be taken by both to ensure that this does not continue.⁴

[25] [Ms Drake] had, unilaterally, suspended [Jethro]'s contact with his father up until that hearing. She had done this even though a without notice application by her to have the order suspended had been declined. Judge Smith ordered that contact should resume on a gradual basis and was very clear that, whilst it should be monitored, it did not need to be formally supervised. [Ms Drake] however took the view that the Judge had ordered supervised contact and was resistant to contact resuming in the way envisaged by Judge Smith. Eventually [Ms Drake] made a proposal for contact which Judge Smith approved and a limited form of contact was resumed.

[26] [Ms Drake] was resistant to the 2020 parenting order resuming, even after it appeared that Mr [Drake] had done all that had been asked of him by Judge Smith. The issue came before me and on 2 March 2022 I directed that contact in accordance with the parenting order of 14 January 2020 was to resume.

[27] Mr [Drake]'s application for [Ms Drake] to be admonished encompasses the period from early 2021 until Judge Smith's directions in October 2021, along with a variation in his contact over the summer 2020/2021 holidays, a variation that he feels was imposed upon him by [Ms Drake].

[28] As part of his response to [Ms Drake]'s application to suspend the parenting order, filed in April 2021, Mr [Drake] applied for [Jethro] to be placed in his day-to-day care in [town B]. It was, effectively, that application that I have just heard.

The law

[29] Section 4 Care of Children Act 2004 provides:

4 Child's welfare and best interests to be paramount

- (1) The welfare and best interests of the child must be the first and paramount consideration—

⁴ Agreed bundle, page 378.

- (a) in the administration and application of this Act, for example, in proceedings under this Act; and
 - (b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.
- (2) The welfare and best interests of the particular child in his or her particular circumstances must be considered.
- (3) A parent's conduct may be considered only to the extent (if any) that it is relevant to the child's welfare and best interests.
- (4) For the purposes of this section, and regardless of a child's age, it must not be presumed that placing the child in the day-to-day care of a particular person will, because of that person's sex, best serve the welfare and best interests of the child.
- (5) In determining what best serves the child's welfare and best interests, a Court or a person must take into account—
- (a) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and
 - (b) any of the principles specified in section 5 that are relevant to the welfare and best interests of the particular child in his or her particular circumstances.
- (6) Subsection (5) does not limit section 6 (child's views) or prevent the Court or person from taking into account other matters relevant to the child's welfare and best interests.
- (7) This section does not limit section 83 or subpart 4 of Part 2.

[30] Section 5 provides:

5 Principles relating to child's welfare and best interests

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

- (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapu, and iwi:
- (b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians:
- (c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order:

- (d) a child should have continuity in his or her care, development, and upbringing;
- (e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapu, or iwi should be preserved and strengthened;
- (f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened.

[31] Section 6 provides:

6 Child's views

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

[32] I must and do have regard for the provisions of ss 4, 5 and 6 of the Act.

[33] Section 4 requires me to consider the welfare and best interests of [Jethro] as the first and paramount consideration in his individual circumstances. I need to make decisions appropriate to his sense of time. The gender of the parent is not a relevant consideration and the conduct of the parent does not need to be considered unless it is relevant to the welfare and best interests of the child.

[34] I also must have regard to the specific provisions in s 5 when considering what is in the best interests and welfare of [Jethro]. In particular, that he needs to be protected from all forms of violence including psychological harm (s 5(a)), that [Jethro]'s parents have the primary responsibility for him (s 5(b)), that there should be ongoing consultation and co-operation between them (s 5(c)), that there should be continuity in his care arrangements and there is the right to have a continuing relationship with his parents (s 5(d)), that familial relationships should be preserved and strengthened (s 5(e)), and that his individual identity as a person (including

matters of culture, language and religion) needs to be preserved and strengthened (s 5(f)).

[35] I have not set out s 5A of the Act, which requires that I must have regard to whether there is or has been a final protection order against one or more of the parties. If so, I would need to have regard to whether the protection order is still in force, the circumstances in which it was made and any written reasons given by a judge for the making of the order. There has never been a protection order issued between the parents, although [Ms Drake] has said that she feels one is or might be necessary. I will return to that.

[36] I also must have regard to [Jethro]'s views under s 6, if any. This does not mean that these views are determinative of what the Court orders should be. I need to have regard to [Jethro]'s age, his level of maturity and awareness of all of the relevant factors, and also have regard to the extent that those views might have been subject to manipulation or improper influence.

[37] The Supreme Court in *K v B* considered the application of the principles in s 5.⁵ While this was a relocation case, the statements of principle set out by the Court have a general application to all cases being considered under the Act. The following principles emerged:

- (a) The welfare and best interests of the children are the first and paramount consideration.
- (b) The Court must take into account, in a case-specific way, which of the principles specified in s 5 that are relevant.
- (c) The focus must be on the particular child or children in his or her particular circumstances with no presumption of what the welfare and best interests of the child may require or what influence the s 5 principles may have on that question.

⁵ *K v B* [2010] NZSC 112, [2011] 2 NZLR 1.

- (d) The s 5 principles are not exhaustive of the matters that may be relevant to the welfare and best interests of the children involved.
- (e) The ultimate objective is to determine what outcome will best serve the welfare and best interests of the particular child or children in his or her or their particular circumstances. In making that determination the s 5 principles must each be examined to see if they are relevant, and if they are must be taken into account along with any other relevant matters.

[38] In competing applications for parenting orders a useful list of matters to consider has been set out by Fisher J in *D v W*.⁶ Priestley J in *Brown v Argyll* makes it clear that this is a useful, but is not an exhaustive, checklist.⁷ I will go through the useful list, not as a checklist but as a way of highlighting the relevant evidence and demonstrating the reasons for my overall judgment. In doing so I have regard to all of the evidence but do not intend to traverse all of the evidence as illustrations on each important point.

The strength of existing and future bonding

[39] As part of the preparation for this hearing the Court directed a report pursuant to s 133. That was prepared by a psychologist Dr Madhu Rai. She gave evidence and was cross-examined by Mr Jefferson in detail. Dr Rai conceded to a number of factual errors in her report. For example, she had reported that Judge Smith had reinstated the January 2020 parenting order at the end of his safety hearing in October 2021. As already discussed, the original parenting order was reinstated by me in March 2022. Dr Rai had also got a detail around some of the holiday contact incorrect. Mr Jefferson was able to pick out a few other factual errors but Dr Rai was clear that none of the things Mr Jefferson was able to highlight affected the fundamental data upon which Dr Rai made her findings.⁸ I find that those mistakes, such as they were, are immaterial to Dr Rai's conclusions, conclusions that I accept.

⁶ *D v W* [1995] 13 FRNZ 336 (HC).

⁷ *Brown v Argyll* [2006] NZFLR 705 (HC), (2006) 25 FRNZ 383 (HC).

⁸ NOE page 204, lines 1-4.

[40] It is [Ms Drake]'s firm and sincerely held view that [Jethro] does not enjoy his time with his father because, amongst other reasons, he feels unsafe in his father's care. [Ms Drake] believes this because this is what [Jethro] tells her. One of the features of [Jethro]'s behaviour is his spontaneous criticisms of his father and of [Jethro]'s life with his father. By way of examples Dr Rai reports on her second meeting with [Jethro]:

on the way to the school office, when [Jethro] was informed that somebody had come to see him, he told [his teacher] that "my dad strangled me and my lawyer doesn't believe me".

[41] At that point he believed his court appointed lawyer was coming to see him.⁹

[42] In her affidavit evidence [Ms Drake] deposed that when she collects [Jethro] from contact almost the first thing he does is to "download" and tell her all about his father in a negative way.¹⁰ [Ms Drake] believes that [Jethro] does not enjoy his time with his father. Although her views were not expressed in terms of whether or not [Jethro] is "bonded" with his father, it was clear to me from all of the evidence that she does not believe that there is a close bond. She believes that [Jethro] is frightened of his father and constantly at risk in his care. She believes this because [Jethro] tells her that this is so. [Jethro] tells her that this is so because [Jethro] believes that is what his mother wants to hear.

[43] The objective evidence however is that [Jethro] is closely bonded to his father. Dr Rai observed them together and reported that:

[Jethro] initiated contact with Mr [Drake] and Mr [Drake] responded well. At one stage [Jethro] stroked his arm while he was lying head down in Mr [Drake]'s lap. A natural interaction was observed when [Jethro] stroked Mr [Drake]'s face to talk to him.¹¹

[44] Dr Rai also reported that: "[Jethro]'s contact with his father is meaningful and Mr [Drake] is an attentive hands-on father."¹²

⁹ Agreed bundle, page 66, paragraph 33.

¹⁰ Agreed bundle, page 102, paragraph 68.

¹¹ Agreed bundle, page 368, paragraph 41.

¹² Agreed bundle, page 368, paragraph 42.

[45] After [Jethro] had met with me and was leaving the courthouse on the morning of the second day of the hearing, he happened to encounter his father coming into the building. Everyone agreed that [Jethro] spontaneously greeted his father in a way that the observers described as loving and moving.

[46] As to the suggestion that [Jethro] is actually scared of Mr [Drake]; Dr Rai's opinion, which I accept, was that this was not supported by either her observation of [Jethro]'s interaction with his father, or the school's observations when [Jethro] is picked up by his father for contact, or by data from collateral sources.¹³

[47] There is no doubting [Jethro] has a very close and loving bond with his mother. As will be discussed further, the nature of [Jethro]'s bond with his mother is in fact a problem. He has a close and loving bond with his father at present. As will also be discussed further on however, that bond is at risk.

Parenting attitudes and abilities

[48] It is at risk because of the very negative view that [Ms Drake] holds of Mr [Drake]'s parenting abilities and in particular her view that [Jethro] is unsafe in Mr [Drake]'s care. On a number of occasions in her affidavits she referred to [Jethro] coming back from contact with his father in a soiled or dirty state. She does not believe that [Jethro] is encouraged to wash, shower or clean his teeth. She does not believe that he is fed healthy food.

[49] When asked outright by Ms Gelston, [Jethro]'s lawyer, whether or not Mr [Drake] is a "good dad", even though the question was put to her twice, she was unable to agree.¹⁴

[50] She believes that [Jethro] feels unsafe in his father's care. She believes this fundamentally because this is what [Jethro] tells her. The issues as to safety go back to the incident in January 2021. I have already recounted Judge Smith's findings. I of course accept those findings. I also accept Mr [Drake]'s account of that day that he

¹³ Agreed bundle, page 370, paragraph 57.

¹⁴ NOE page 54, lines 5-13.

gave in court before me, which was that [Jethro] was throwing a significant tantrum, punching and kicking out at his father and that Mr [Drake]'s only option was to restrain [Jethro].¹⁵ There are occasions when it is entirely necessary for a parent to do this. It is certainly not forbidden by law, if nothing else it is for a child's safety. I have no doubt that there was no intention by Mr [Drake] to make [Jethro] feel that he couldn't breathe. I also accept that may well have happened, albeit very briefly. It is not hard to imagine a number of circumstances in which a small child, throwing a significant tantrum and thus being restrained by an adult male, might feel momentarily unable to breathe. I do not in fact regard Mr [Drake]'s method of controlling [Jethro] that day as a parental failing. A child who is out of control and hurting other people must be controlled, albeit in the safest way available.

[51] [Jethro] tells his mother that his father drives dangerously and at speed. [Ms Drake] believes this to be true. There is no other evidence that this is so however and, given [Jethro]'s desire to tell his mother what he thinks she wants to hear, as I will come to, I dismiss it as a concern.

[52] As for the allegations that Mr [Drake] cannot attend to [Jethro]'s basic hygiene and does not feed him healthy food; there is no objective evidence around that other than [Ms Drake]'s observations and what [Jethro] tells her. Dr Rai reported that this was not an observation supported by the school and [Ms Drake]'s inability to allow a variation in the parenting order, one that would have enabled Dr Rai to observe [Jethro] in his father's care in [town B], meant that Dr Rai was unable to do so. Despite this, Dr Rai's observation and data led to the opinion that Mr [Drake] "is an attentive, hands-on father."¹⁶

[53] The objective evidence, evidence with which [Ms Drake] took no issue, is that [Jethro] does a lot of enjoyable things with his father, especially when they are in [town B] together. His father loves the outdoors, in particular the sea and the beach and those appear to be activities that [Jethro] engages in with him happily.

¹⁵ NOE page 180 and others.

¹⁶ Agreed bundle, page 368, paragraph 42.

[54] I find that both parents are more than able to meet [Jethro]’s everyday needs. Both parents hold negative views of the other. [Ms Drake]’s view is that Mr [Drake]’s parenting fails in almost all regards, a view I reject. Mr [Drake]’s view is that [Ms Drake] is in most ways an excellent mother, a view I accept without reservation. Mr [Drake]’s view is that [Ms Drake]’s negative view of him however is picked up by [Jethro], I agree that it is, and that it is a threat to the security of his relationship with [Jethro]. Again, I agree. I do not find that Mr [Drake] passes on his reservations about [Ms Drake] to [Jethro].

Availability for and commitment to quality time with the child

[55] Despite being in an occupation that is inevitably very demanding and must at times be very stressful, [Ms Drake] has always ensured that she is available to [Jethro]. She has juggled these two competing commitments admirably. She also ensures that the time she spends with [Jethro] is of the highest quality.

[56] Mr [Drake]’s work has varied in the years that he has lived in New Zealand. At times he has not worked and has relied on [Ms Drake]’s income to support the family. A number of criticisms were levelled at him on behalf of [Ms Drake]; that he has not involved himself with [Jethro]’s school; that when in [town A] he does not take [Jethro] to his sports and allow [Jethro] the enjoyable and very beneficial experience of having his father watching him play sport and there is some merit to these criticisms. I do find that Mr [Drake] has preferred to nurse a grievance that [Ms Drake] has failed to properly consult and involve him in [Jethro]’s schooling, rather than proactively get involved himself. It is true also that Mr [Drake] has taken the view that on his weekend visits to [Jethro] in [town A] he prefers to spend what he regards as “quality time” directly with [Jethro], rather than on the touchline with other parents.

[57] However I have no doubt that if [Jethro] were living in [town B] Mr [Drake] would always be available to him when needed and that he would continue all the stimulating and enjoyable things that he currently does with [Jethro] when [Jethro] is staying with him over there. Mr [Drake] currently works for a Māori [details deleted]. Part of the kaupapa of his employer is to put whānau first and I have no doubt that Mr [Drake] would do this. From what little I learned of his work, it seemed clear that it

is not as demanding as is [Ms Drake]’s. At times when [Jethro] is in his care Mr [Drake] is available to him and that will continue to be the case. There is no difference between the parents on this score.

Support for continued relationship with the other parent

[58] It is each parent’s ability to support [Jethro]’s relationship with the other that ultimately leads to the conclusion I must come to.

[59] Mr [Drake] nurses a strong sense of grievance when it comes to [Ms Drake]. He believes that when she moved back to [town A] in late 2018 she had already resolved never to return to [town B] and that she was, effectively, unilaterally relocating [Jethro] at that time without his consent. He believes that he was lied to and that, in terms of his relationship and contact with [Jethro], it has cost him dearly. Mr [Drake]’s cross-examination of [Ms Drake] was taken up far more with these grievances than they were with [Jethro]’s future care and best interests.

[60] I do not need to make findings as to whether I agree or not with Mr [Drake]’s view of [Ms Drake]’s actions over that period. As it happens I have come to the view that she left [town B] never intending to return, (she bought a house in [town A] very quickly after moving back here), but I also believe that she wanted the marriage to work and that she hoped Mr [Drake] would join her and [Jethro] in [town A], albeit in a different relationship, one that worked better for her. In any case, in January 2020 Mr [Drake] accepted the situation and agreed to a parenting order that had [Jethro] in his mother’s day-to-day care in [town A] and with him having contact on the third, fifth and seventh weekends of each school term, 10 days in the school term holidays and for four weeks of the Christmas holidays.

[61] Mr [Drake] believes that [Ms Drake] wishes to “alienate” [Jethro] from him. He believes that [Ms Drake] has used [Jethro]’s allegations as a way of controlling his contact with [Jethro].¹⁷

¹⁷ See for example the judgment of Judge D G Smith, 22 October 2021, paragraphs 19 and 20, where his Honour rejects that view as being correct.

[62] Importantly however I find that Mr [Drake] has not imparted these views to [Jethro]. Whilst I accept that Mr [Drake] has on occasion behaved churlishly towards or around [Ms Drake] it has not been in a way that has impacted upon [Jethro].

[63] The same cannot be said for [Ms Drake]. [Jethro] volunteers negative information about his father even when unprompted. He did that at school when being led by his teacher to meet Dr Rai. He did so to Dr Rai. He has done so to his lawyers. He did it when he met with me. Most of all he does it to his mother. As Dr Rai has reported, “[Jethro] holds an extremely negative view of his father.”¹⁸ In Dr Rai’s opinion [Jethro] was volunteering “rehearsed stuff.”¹⁹ The question is why?

[64] In Dr Rai’s opinion:

[Jethro] is aligning with [Ms Drake]’s entrenched views about his safety with Mr [Drake] and his ability to provide care for him in general, eg, hygiene, [Jethro] not having a bath or showers while in his care, feeding him by buying cooked food from the dairy and supermarket, not having proper sleeping arrangements and [Jethro] being unsafe.²⁰

[65] This has led Dr Rai to be concerned about [Jethro]’s emotional well-being. In Dr Rai’s opinion [Jethro]:

is exposed to parental conflict to such an extent that his relationship is becoming enmeshed with [Ms Drake]’s views and opinions. [Ms Drake] informed that she is open and honest with [Jethro]. This, however, is impacting on his ability to maintain a meaningful relationship with his father. Even though [Jethro] may have a positive experience of his time with his father, he refuses to admit that he has.²¹

[66] [Jethro] had even told Dr Rai that, in Dr Rai’s presence, “dad dragged me by the leg”. Dr Rai reported that [Jethro] was adamant this had happened in front of her.²² She described this as [Jethro] trying to create what she termed a “disconnect”, that he was trying to “refute his own experiences of his care of his father [sic]”.²³

¹⁸ Agreed bundle, page 367, paragraph 35.

¹⁹ NOE page 207, line 32.

²⁰ Agreed bundle, page 368, paragraph 42.

²¹ Agreed bundle, page 369, paragraphs 49-50. See also footnote 7 of Dr Rai’s report as to the possible serious consequences to a child of parental conflict.

²² Agreed bundle, page 367, paragraph 39.

²³ NOE page 209, line 25.

[67] Data from the school did not report any changes in [Jethro]’s behaviour whenever he returned after having contact with his father.²⁴

[68] One of the drivers of [Ms Drake]’s views of Mr [Drake] as a father has come about through what [Jethro] tells her about his father, the way he “downloads” immediately after returning to her care. Dr Rai explained this. Children of [Jethro]’s age, she advised, are not critical thinkers. In Dr Rai’s opinion: “[Jethro] is believing and taking on [Ms Drake]’s narrative and the concerns she has for his safety.”²⁵

[69] Dr Rai described [Ms Drake]’s behaviour around [Jethro] and his relationship with his father as “gatekeeping”.²⁶ She was challenged on that view by Mr Jefferson but maintained that very clear view.²⁷ She gave her reasons for her views and I accept that both her reasons and her views are sound. [Ms Drake] does not accept Judge Smith’s findings, either the factual findings or the overall finding of safety. She said so in evidence. As a result she provides [Jethro] with what has been described as a safety watch, a device for use in case of emergencies. When he goes to his father she gives him an extra bag containing all the essential things she believes he needs and which his father will not provide. She will provide him with coins so that he can shower if they are staying at the campground. She will apply for a protection order if Mr [Drake] moves to [town A].²⁸ In Dr Rai’s view all of this behaviour has made [Jethro] anxious and amounts to restrictive gatekeeping.²⁹

[70] In Dr Rai’s view there is a risk that this will lead to [Jethro] refusing and resisting contact with his father.³⁰ [Jethro]’s exposure to parental conflict and knowledge of family dynamics is, in Dr Rai’s professional opinion, to the extent that it is considered an Adverse Child Experience (“ACE”). The more ACE’s children

²⁴ Agreed bundle, page 368, paragraph 44.

²⁵ NOE page 211, line 28.

²⁶ Agreed bundle, page 370, paragraph 56.

²⁷ NOE page 218, line 4.

²⁸ In her first two affidavits to the Court [Ms Drake] was clear that she had no safety concerns and raised no issues of family violence. In a subsequent affidavit she referred to “emotional abuse” but provided no other details. I observed in court that nothing I had seen in evidence came close to justifying a protection order.

²⁹ NOE page 219, line 6.

³⁰ NOE page 222, line 31.

have, the greater are their risks for far-reaching adverse outcomes educationally, interpersonally, health wise and mental health wise.³¹

[71] In Dr Rai's opinion [Ms Drake] needs professional help to reduce the level of enmeshment and to stop exposing [Jethro] to her fears about his father.³² Dr Rai did agree that there were some real risks attached to Mr [Drake]'s application for [Jethro] to move to [town B] and did feel that there were some potential remedies, such as professional help for [Ms Drake] that might remediate the issues around [Jethro]'s relationship with his father.³³

[72] Various parts of the evidence also lead me to the view that [Ms Drake] has not respected Mr [Drake]'s role as one of [Jethro]'s two guardians to the extent that should have been the case. She nominated two primary schools for [Jethro] to attend and then gave Mr [Drake] the option of choosing one of them. She has been tardy in ensuring that [Jethro]'s school provides Mr [Drake] with all of the information that she gets from the school. (I do not ignore in all of this that Mr [Drake] could have done more for himself.) She has arranged counselling for [Jethro], without consulting Mr [Drake].

[73] My conclusion is that [Ms Drake] does not support the relationship between [Jethro] and his father, she undermines it, albeit largely unwittingly. All of this presents significant risks to [Jethro]'s development, risks that are likely to be realised in one form or another unless something changes.

Security and availability of home environment

[74] I have no doubt that [Ms Drake] provides a wonderful home for [Jethro]. Dr Rai was not able to visit [Jethro] at his father's home, for reasons already set out. Mr [Drake] is in a relatively new relationship. His partner is [Charlotte Winiata]. He and Ms [Winiata] have been together for less than a year. They have bought a house together in [town B], she relocated from [another town] to be with him. She is a [profession deleted]. She gave evidence and I was impressed by her.

³¹ Agreed bundle, page 371, paragraph 59.

³² NOE page 232, line 27.

³³ NOE page 233, lines 1-16.

[75] One of [Jethro]'s narratives is that Ms [Winiata] smokes, swears and has hit Mr [Drake]. He also has complained that Ms [Winiata] has called him stupid. All of these things were put to Ms [Winiata] and I am completely satisfied with her answers. She smokes cigarettes outside.³⁴ [Jethro] overhears adult conversations that includes the occasional swearword at times when he is not supposed to be present.³⁵ The word "stupid" was put in an entirely understandable context.³⁶ She has not assaulted Mr [Drake].³⁷

[76] [Ms Drake] was silent about any current relationship she has. I am satisfied however that both homes provide an excellent environment for [Jethro].

Availability and suitability of role models and positive and or negative effects of wider family

[77] For the most part the parents' families live in Europe. Mr [Drake]'s parents have visited New Zealand and the evidence led me to the conclusion that [Ms Drake] could have done a lot more to enable contact between [Jethro] and his paternal grandparents.³⁸

[78] Ms [Winiata] could play a significant role in a number of ways. She and Mr [Drake] have been in a relationship for less than a year and I am cautious about placing too much reliance upon her, however provided that what I assess to be a healthy relationship lasts, [Jethro] will have the advantage of witnessing a healthy adult relationship and will come to see his father in a more normal light.

[79] Whilst [Ms Drake] alluded to having close friends there was no evidence of a positive male role model for [Jethro] in [town A], something that I regard as significant under all of the circumstances that [Jethro] faces.

Provision for physical care and help and the material wealth of the parents

³⁴ NOE page 269, line 20.

³⁵ NOE page 269, line 27 and 273, line 20.

³⁶ NOE page 268, line 9 and 272, line 5.

³⁷ NOE page 270, line 20 and 272, line 20.

³⁸ NOE pages 31-34.

[80] No evidence was given by either parent as to their income. It is safe to assume that [Ms Drake] enjoys an income that is superior to the majority of the population. Both parents own their own homes. There is no reason to suppose that [Jethro] will be materially deprived in either home.

Stimulation and new experiences

[81] [Ms Drake] is an involved and active parent. There was evidence that [Jethro] enjoys a good range of sports and cultural activities in her care. Whilst Mr [Drake] is [country deleted] born and has no direct Māori whakapapa of his own, he is genuinely interested in and committed to this aspect of life in Aotearoa New Zealand. He was learning Te Reo prior to the parents separating. He works for a [employer deleted]. It is clear that part of the attraction of life in [town B] for Mr [Drake] is that he can immerse himself to a greater extent in te ao Māori than he feels can be the case in [town A]. The parents have given [Jethro] a Māori middle name.

[82] Mr [Drake]'s written submissions, which drew my attention to the relevant provisions of the Care of Children Act that I must apply, referred to concepts of manaakitanga, whanaungatanga and wairuatanga. Mr [Drake] was entirely sincere about this. He told me that he wishes to “immerse [Jethro] in the bicultural nature of our rohe”.

[83] Mr [Drake] also has a love of the sea and is clearly deeply immersed in general in his local community. If given the space, he will add considerably to [Jethro]'s stimulation and new experiences. There is a danger that that space will be lacking if [Jethro]'s relationship with his father continues to be restricted.

Educational opportunities

[84] Whilst I might suspect that the bigger centre offers the greater educational opportunities, there was no evidence on this point and I'm not going to attempt to draw a distinction between the educational opportunities available to [Jethro] in [town B] as compared to [town A]. Given that both of [Jethro]'s parents are highly educated [Jethro]'s education is no doubt something that they both take seriously.

Wishes of the child

[85] [Jethro] does not like the food at his father's house. He does not like it that his father tries to make him eat the food placed in front of him, meat and broccoli. He does not like Ms [Winiata] because she “smokes and swears”, something that he quickly volunteered to me when but which he also told his lawyer. [Jethro] finds his father's driving scary.

[86] [Jethro] was asked what his ideal care and contact arrangements would be. His answer closely mirrored [Ms Drake]'s application, even down to some of the details. He told his lawyer that his mother had discussed the Court case with him. He was not aware however that the case was being heard on the day that he came to visit me.

[87] [Jethro] believes that his father “almost killed” him when he was little.

[88] [Jethro] therefore does not wish to live in [town B]. He wants the parenting arrangements to stay more or less as they are now.

[89] An observation highly relevant to this application was made in *Brown v Argyll* where Priestley J at para [49] considered the question of the child's views under s 6 and how that issue interrelates with the best interests and welfare of the child under s 4. His Honour noted the application principle in this way:

The s 6(2)(b) requirement for the Court to take the child's views into account does not mean such views must be followed or are in any way determinative. Such views may well be in clear conflict with the Judge's s 4 assessment and in particular conflict with the s 3(1)(a) purpose of promoting a child's welfare, best interests, and development. Human beings are frequently not the best arbiters of their own best interests. Children, who have yet to develop to adulthood and are so frequently the casualties of parental conflict, are no exception to that truism.

Where equal care is sought

[90] This is not on the face of it an application for equal shared care. However [Ms Drake] was very clear; if I direct that [Jethro] is to live in [town B] she will move too. She was visibly distressed as she contemplated having to do this and I commend her for not trying to hold the Court to ransom by declaring that she would stay behind in

[town A] in that event. Mr [Drake] was ambivalent as to whether or not he would move to [town A] if his application was unsuccessful. He thought that he might, but I cannot in any way be certain of that. However if both of these parents end up in the same city/town then I will make an order for equal shared care. Equal care is something that I must therefore consider.

[91] I am mindful of the comments made by the High Court in *A v G* which set out what is required for a successful shared or equal parenting regime to succeed.³⁹ At para [67] Hansen J set out the relevant principles in this way:

In an ideal world shared parenting is an attainable goal. However, without doubt, a number of factors need to be present before it can be successful. In that regard I adopt and agree with Ms Nebbs as to many of those factors. Firstly, there needs to be a good working relationship between the parents. Secondly, they should live within close proximity of one another so the children can continue to attend regular kindergarten or school and extra curricula activities. Where that does not occur it is difficult for children to develop peer relationships. Each parent would need to have the same routine in each household so they do not become confused by change. There should be unlimited access via telephone with either parent. The children should have sufficient cognitive maturity to understand the concept of time, and the concept of object permanency. They need to have established a secure attachment relationship with the primary caregiver, and they should have a secure attachment relationship with the secondary attachment figure.

[92] Gault J in *B v E* noted the difficulties which can arise from a shared parenting arrangement:⁴⁰

Any arrangement by which a child spends substantial time with each parent has the potential for harm to the child arising from inconsistent activities, influences and living patterns. To reconcile these for the purpose of providing the child with stable and consistent support necessarily must involve substantial agreement and co-operation between the parents exercising access rights. I think that the difficulties are likely to be less however when primary responsibility for the care of the child rests with one parent rather than with both.

[93] Of the aforementioned principles, I note that the proposition that there needs to be a good working relationship between the parents in order for a successful shared

³⁹ *A v G* HC Invercargill CIV-2006-425-489, 21 December 2006.

⁴⁰ *B v E* [1988] 5 NZFLR 65 (HC), (1988) 3 FRNZ 694 (HC).

or equal parenting regime to succeed is not a prerequisite for shared parenting. In *L v A*, Baragwanath J observed:⁴¹

To assume that the paradigm of a unified marriage in a single home means that the child of separated parents must live primarily with one parent or another unless the relationship of the separated parents is harmonious overlooks the possibility that in some cases it may be in the child's interest to have two homes not one. To the extent they require that course *B v VE* and *R v R* are inconsistent both with the policy expressed in the final sentence of para [36] of *D v S* and with UNCROC.

The true approach is rather to examine the factual considerations that may bear on the children's welfare without preconception, although recognising that disharmony and the reasons for it are likely to bear heavily on the Court's evaluation of what is in the children's interests...

[94] Moreover, the Court of Appeal in *B v K* commented that it is generally desirable, even where there is parental conflict, that children maintain good relationships with both parents and what is important is not the existence of parental conflict itself but its potential effect on the children.⁴² The case of *Shaw v Brown* illustrates that shared parenting is possible notwithstanding the existence of parental conflict.⁴³

[95] I am also mindful that in respect of shared parenting under the Act, both the Family Court and the High Court have recognised that this does not create a presumption of the child needing or being required to spend an equal amount of time with each parent.⁴⁴

[96] In *B v T* Churchman J considered the impact of mutual distrust and the inability of parents to communicate or co-operate on matters affecting their children in this way:

[109] ...There is no presumption that the concept of shared parenting always involves the children concerned spending a precisely equal amount of time with each parent. Although the older cases which imply that a co-operative and communitive relationship between parents is a prerequisite for shared care are no longer good law, the effect of interparental conflict on the welfare of the children can still be a relevant matter in determining the details

⁴¹ *L v A* (2003) 23 FRNZ 583 at [48]-[49].

⁴² *B v K* [2010] NZCA 96 at [59].

⁴³ *Shaw v Brown* [2014] NZHC 2843.

⁴⁴ *TW v LJW* [2012] NZFC 944 at [66]; and *B v T* [2018] NZHC 2801 at [109].

of the shared care arrangement that will be in the best interests of the children concerned and will ameliorate, to the extent possible, the potential adverse consequences of conflict, dysfunction and animosity between parents.

[97] Dr Rai's view was that:

If both parties lived in the same town ([town A] or [town B]) there are advantages for both of them to be equally involved in [Jethro]'s care. This will enable [Jethro] to experience his father's parenting which is different but no less valid than his mother's style...Parallel co-parenting should be considered. Parallel co-parenting is the most common and is characterised by emotional disengagement, low conflict and low communication. The parents tend to be compliant and follow their parenting plan but are unlikely to co-ordinate child rearing practices or schedules...children whose parents engage in conflict free parallel-parenting appear to thrive as long as the children have adequate parenting in both homes. The writer's assessment supports this.

For parent wanting contact where there is a reluctant primary caregiver

[98] In this case I also have regard to the specific principle set out in s 5(d) of the Act. It provides:

(d) relationships between the child and members of his or her family, family group, whānau, hapu, or iwi should be preserved and strengthened, and those members should be encouraged to participate in the child's care, development, and upbringing.

[99] The provisions of s 5(d) were considered in the decision of *MT v AR*.⁴⁵ At paras [9] and [10] of the judgment Judge Coyle set out the principles to be applied in this way:

[9] As I have said in other cases, it is my view that the words “and strengthened” are two of the most important words in the Care of Children Act and should not be overlooked.

[10] Preservation envisages a continuation of relationships whereas “strengthened” envisages a building upon and a growing of relationships. Given that I am required to consider, as part of my overall discretion in deciding upon what is in the best interests and welfare of A, the principles in s 5, it is my view that I must, in exercising the discretion today, have the concepts of preservation and strengthening foremost in my mind.

⁴⁵ *MT v AR* [2010] NZFLR 613 (FC).

[100] In light of all of the evidence I consider this principle to be uppermost. As Dr Rai observed “even though [Jethro] may have a positive experience of his time with his father, he refuses to admit that he has”.⁴⁶ She went on to observe:

If [Jethro] is to live in [town A] the biggest risk for him is that his relationship with his father is going to be undermined, not because of lack of contact but because of [Ms Drake]'s failure to support and promote that contact.⁴⁷

[101] And noted in her conclusion that she was “concerned that [Ms Drake] is rigidly controlling the ability of Mr [Drake] to have a meaningful relationship with [Jethro]”.

[102] She referred to [Ms Drake]'s:

restrictive gatekeeping behaviours, which are more likely to impact negatively on the social and psychological resources Mr [Drake] can offer [Jethro]...the Court needs to determine which parent is most likely to support [Jethro]'s relationship with the other parent. That parent should have the responsibility of providing the day-to-day care of [Jethro].⁴⁸

[103] In my judgement [Ms Drake] is incapable of supporting [Jethro]'s relationship with his father at present. She is in fact obstructing that relationship with the real potential for significant harm to [Jethro].

Section 5 considerations

[104] Where there are competing applications for day-to-day care, I consider an examination of the criteria in *D v W* sit comfortably alongside the issues to be considered under s 5 when determining what is in the best interests and welfare of a child. Addressing the s 5 principles which the Supreme Court in *K v B* requires me to do:

- (a) *a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in s 3(2) to (5) of the Domestic Violence Act 1995) from all persons, including members of the child's family, family group, whānau, hapu, and iwi*

⁴⁶ Agreed bundle page 369, paragraph 50.

⁴⁷ Agreed bundle page 372, paragraph 69.

⁴⁸ Agreed bundle page 373, paragraphs 74 and 75.

[105] This principle mandatorily requires me to make a parenting order which ensures the children are kept safe. [Jethro]'s lawyer, Ms Gelston posited her closing submissions very firmly on the principles set out in s 5 and addressed the issue of safety first.

[106] In submissions with which I agree, she pointed out that in [Ms Drake]'s first two affidavits there was no suggestion of family violence or any risk to [Jethro]'s safety. Everything changed after the January 2021 incident. Judge Smith has already found that the incident did not happen in the way [Jethro] has described. Having heard from Mr [Drake] directly on the point I am satisfied that the incident happened in the way Mr [Drake] described; a child having a significant tantrum had to be restrained. Anything that stopped [Jethro] breathing was a most unfortunate by-product of that and was entirely unintentional on Mr [Drake]'s part.

[107] The greatest problem around that incident and the greatest risk to [Jethro]'s safety is [Ms Drake]'s genuinely held view that this was a "strangulation" and that there is a real risk of it happening again. [Jethro] even goes so far as to say that his father tried to kill him. This is an extreme reaction and I find that it poses a significant risk to [Jethro]'s emotional safety.

[108] Ms Gelston witnessed [Jethro] bumping into his father unexpectedly as he was leaving the courthouse, shortly after meeting me. She described [Jethro]'s reaction to seeing his father as moving, spontaneous and indicating delight. It is this dichotomy that Dr Rai believes could prove so harmful to [Jethro], so harmful that it could lead to him resisting or refusing contact with his father, something she described as an ACE of a significant kind. I agree with Ms Gelston, that Dr Rai's conclusions are "significant and valid".

[109] I also agree with Ms Gelston, that [Ms Drake] is a lovely mother, not dishonest in any way, that she is a formidable and exceptional parent. That however is the problem. The views she holds as to the risk faced by [Jethro] in his father's care and the views she holds of Mr [Drake] are genuinely held and deeply entrenched.

[110] [Jethro] is physically safe in the care of either parent. His emotional safety is at significant risk if he remains in his mother's full-time care.

(b) a child's care, development, and upbringing should be primarily the responsibility of his or her parents and guardians

[111] This principle will be met by the making of a comprehensive parenting order setting out the care and contact arrangements for [Jethro]. It will be a prescriptive and detailed care arrangement which must be followed, which can be enforced if necessary and there can be consequences for parents who do not comply.

[112] Because I am confident that [Ms Drake] will, true to her word, move to [town B] to be close to [Jethro], it will provide for equal shared care.

(c) a child's care, development, and upbringing should be facilitated by ongoing consultation and co-operation between his or her parents, guardians, and any other person having a role in his or her care under a parenting or guardianship order

[113] This principle requires parents and guardians of children to consult and co-operate on matters affecting their children. They must learn to put aside whatever personal issues or agendas they may have towards one another, and focus on what is best for their children. They are now in the business of parenting their child through until his teenage years and beyond. They need to learn to look at the world through their child's eyes and focus on what is best for them. Children have a right to have a relationship with each of their parents, and it is not either parent's right to take this away from them.

[114] The parties need to learn to communicate on parenting and guardianship issues, and any changes needing to be made to the parenting arrangements, in a safe way. I will address the s 5(c) principle in the communication provisions in the parenting order I am about to make.

[115] Ongoing co-operation between the parents is, as Ms Gelston submitted, more important in this proceeding than is often the case. At present [Ms Drake] is failing in this regard. Mr [Drake] is also not without fault. There will be greater co-operation

with both parents living in the same area and sharing [Jethro]'s care equally. Parallel parenting will happen.

(d) a child should have continuity in his or her care, development, and upbringing

[116] On the face of it this principle might be seen to require [Jethro] remaining in [town A]. It will in fact be met by him moving to [town B], because only in that way will he have a continuous, sustained relationship with his father and have his father involved in his care, development and upbringing. Only in that way will both of his otherwise excellent and loving parents be able to remain in his life.

[117] In any case, [Jethro] is familiar with [town B]. He lived there permanently for some years and has returned on a regular basis during the school holidays, since his mother returned to [town A] in late 2018.

[118] In my judgement however this principle mandates a transition to equal care in a way that is managed according to [Jethro]'s timescale. That is what I shall attempt to do.

(e) a child should continue to have a relationship with both of his or her parents, and that a child's relationship with his or her family group, whānau, hapu, or iwi should be preserved and strengthened

[119] This principle requires me to make orders which will preserve and strengthen the children's relationship with their parents and their wider family. The order that I am going to make, directing equal shared care in [town B] is, in my judgement, the best and only order suited to ensuring that [Jethro] has a continuing relationship with both of his parents.

[120] I have already drawn attention to the issues that arose when Mr [Drake]'s parents visited from [overseas]. Again, it appears that equal shared care and a prescriptive order is going to be necessary to ensure that [Jethro] maintains a relationship with both sides of his family.

(f) a child's identity (including, without limitation, his or her culture, language, and religious denomination and practice) should be preserved and strengthened

[121] In this case I heard no particular evidence about this issue which I need to consider and factor into the parenting order I am about to make. I do bear in mind however that [Jethro] will be better placed to become a more complete citizen of modern Aotearoa New Zealand in his father's care as he will develop a much better understanding of te ao Māori.

Parenting order – conclusion

[122] [Jethro] turned eight last [year]. He is being subjected to restrictive gatekeeping by his mother. There is a real risk that this will lead ultimately to [Jethro] resisting or refusing contact with his father. Dr Rai's expert evidence was that the resist/refuse behaviour tends to happen in children of the 10 to 12 age group.⁴⁹ We have therefore a relatively short window if we are to avoid the significant risk of [Jethro] rejecting his father.

[123] One option, and it was an option that was urged upon me by Mr Jefferson on behalf of [Ms Drake], was to give [Ms Drake] six months to engage with the necessary professional help and demonstrate that she can make the necessary changes, changes that [Ms Drake], I was advised, had come to realise needed to be made.

[124] I am not attracted to this option for the following reasons. This acknowledgement by [Ms Drake], that she needed to make what for her will be a significant change, has not been evidenced by anything put before the Court. Mr [Drake]'s application for [Ms Drake] to be admonished and for [Jethro] to move into his full-time care was made two years ago. [Ms Drake] was on notice back then. There was no change in her behaviour between then and the date of hearing. She rejected Dr Rai's report when it was released in October 2022.⁵⁰ She continued to reject it when giving evidence.

[125] In her affidavit dealing with the psychologist's report [Ms Drake] makes mention of seeing two psychologists, one of whom was in order to help her "when considering the terms of the parenting order".⁵¹ That does not tell me anything in

⁴⁹ NOE page 245, line 22.

⁵⁰ Affidavit of [Mallory Drake], 24 January 2023.

⁵¹ Ibid 40, paragraph 74.

terms of [Ms Drake]'s insight as to how her own behaviour affects [Jethro]'s relationship with his father. Given the almost irrefutable evidence, that [Ms Drake]'s behaviour is harming [Jethro]'s relationship with his father and [Ms Drake]'s refusal to accept that concept in her evidence either before or during the hearing, it is clear that the two psychologists she has met with in the past were either not engaged for the purposes of helping [Ms Drake] change or that they failed. The former proposition seems likely.

[126] [Ms Drake]'s acknowledgement that changes needed to be made finally came in her counsel's closing submission, only after I had observed that a change was necessary.

[127] In my judgement [Ms Drake]'s submission that I should give her six months to engage with a professional and make the necessary changes will amount to little more than delaying the inevitable. Having viewed [Ms Drake] over four days in court I find that her views are so entrenched that I do not believe six months is anything like sufficient time to achieve the necessary turnaround. The net effect of engaging in this experiment is much more likely to lead simply to almost another year's delay, another year's damage for [Jethro] and a narrowing of the window of opportunity.

[128] Furthermore, whilst it will be to [Jethro]'s great benefit if his mother can change her opinion of his father, or at least make the pretence of having done so in [Jethro]'s presence and hearing, it is [Jethro]'s view of his father that must be changed. Even if [Ms Drake] had said that she will not move to [town B], I would still order a change in care. That is because [Jethro] must be helped to rid himself of the notion that he needs to express to other people that his father is a risk to his safety, that his father wants to kill him. He needs to stop believing it for himself. The best way for that to happen will be if [Ms Drake] tells [Jethro] that his father loves him very much and that he will look after him very well. [Jethro] must also experience that for himself however. The only way of doing that is for [Jethro] to spend sustained periods of time in his father's care. [Ms Drake] must realise that if she continues to lead [Jethro] to believe that his father is a threat to his safety then it may be necessary to significantly limit or even temporarily stop her contact with [Jethro].

[129] Based upon his age and the stage he is at in terms of his schooling Dr Rai's opinion was that the move should be now, taking into account a suitable transition period.

[130] In my judgement all of the evidence points overwhelmingly to [Jethro]'s best interests being met by living in what will be the equal shared care of both his parents in [town B]. [Jethro]'s chances of being allowed a close and loving relationship with his father without this change are significantly at risk with all of the dangerous consequences that can flow from such a rupture.

Outcome and orders

Admonishment

[131] As regards admonishment, [Ms Drake] has breached the parenting order due to her firmly held view that [Jethro] is at risk in his father's care and that his father is of less value to [Jethro] than she is. I do not share those views, but I accept that they are sincerely held, which is of course the nature of the problem with which I have had to deal.

[132] As a result of [Ms Drake] holding those sincere, deeply held views and as a result of her acting upon those views, there is to be an outcome that will cause quite some distress to [Ms Drake]. [Ms Drake] is someone who I have no doubt is a careful, compassionate and dedicated [profession deleted]. Her life's work is devoted to [details deleted]. In my judgement it would be contrary to [Jethro]'s best interests to take the extra step of admonishing [Ms Drake], which is after all a formal record of the Court. It is unnecessary to do so and I decline to do so.

[133] In making this parenting order I have regard to all of the evidence, even that to which I have not referred.

Parenting Order

- (i) The present parenting order will be maintained until Friday, 22 September 2023, including the changeover arrangements.

- (ii) From Friday 22 September 2023 (which is the start of the school holidays) [Jethro] shall be in the day-to-day care of his father [Derek Drake]. His place of residence shall be [town B].
- (iii) In the event that [Mallory Drake] remains in [town A] after 22 September 2023 then the provisions of the present parenting order shall be reversed so that [Derek Drake]'s contact, as it is presently defined in the parenting order of January 2020, will apply instead to [Mallory Drake].
- (iv) In the event that [Mallory Drake] moves to the [region deleted] area then [Jethro]'s day-to-day care shall be shared equally between his parents, on a week about basis with changeover occurring during the term time each Friday at 3 pm. This arrangement is subject to the following transition.
- (v) Having returned to his mother's care at 3 pm on Monday 2 October, [Jethro] shall be in his father's care from 3 pm on Friday 13 October until 9 am on Monday 16 October, from 3 pm on Friday 27 October until 9 am on Tuesday 31 October, from 3 pm on Friday 10 November to 9 am on Wednesday 15 November, from 3 pm on Friday 24 November until 9 am on Thursday 30 November and from 3 pm on Friday 8 December until 3 pm on Friday 15 December at which point he shall move to his mother's care and the week about arrangement shall commence from that point on.
- (vi) The school term holidays shall be shared by a continuation of this week about pattern. In the ordinary course changeover shall occur by [Jethro] being collected from school by the parent, (or someone nominated by the parent), into whose care he is moving. If [Jethro] is not attending school on the date in question then the parent who is taking over [Jethro]'s care shall collect [Jethro] from the other parent's home. Neither parent will record changeovers in any way and the only other person who may be present at changeovers is the parent's partner. It is

an express condition of this parenting order that the parents will be polite, correct (and hopefully friendly) towards each other whenever they encounter the other parent or the other parent's partner in [Jethro]'s presence and/or hearing.

- (vii) [Jethro] may have video/phone contact with the non-caring parent at 7 pm each Sunday and Thursday. Except in an emergency there shall be no other video/phone contact with the non-caring parent.
- (viii) Both parents are to ensure that each are kept fully informed as to [Jethro]'s school programme and progress, including parent/teacher meetings and other school events that are designed to involve parents.

Sport

- (ix) If [Jethro] is to play sport at the weekend then it is to be first and foremost [Jethro]'s chosen sport, or if not [Jethro]'s chosen sport than a sport nominated by both parents, or if the parents cannot agree on a sport then a sport nominated by [Derek Drake] in the first term, [Mallory Drake] in the second term, [Derek Drake] in the third term and [Mallory Drake] in the fourth term. Except in cases of ill health or other emergency, [Jethro] is to be taken to the sport in question every week regardless of whether or not the other parent has nominated that sport. The parent who nominates the sport shall pay the costs of [Jethro] engaging in that sport. Where it is a sport chosen by either [Jethro] or by both parents then the costs shall be shared equally between the parents, unless the sport that [Jethro] chooses is outside the range of what might be regarded as everyday sports played by most children.

Christmas holidays

- (x) The Christmas holidays shall be shared in the following way: for the holidays commencing in December 2023, regardless of where in the

week about cycle [Jethro] is placed, from 3 pm on the last day of the school term he shall move to [Derek Drake]'s care and shall remain there for three weeks. He shall then move to [Mallory Drake]'s care and remain with her until the Friday before school commences, at which time he shall move to his father's care and the usual week about pattern shall resume at that point.

- (xi) In December 2024 the reverse shall apply, so that he shall be in the care of [Mallory Drake] for the first three weeks of the holidays and these arrangements shall alternate on a year about basis from that point on.

Special days

- (xii) There shall be no variation to this order in the event of Mother's Day, Father's Day, either parent's birthday or [Jethro]'s birthday, except by agreement.

Overseas travel

- (xiii) Unless otherwise agreed, or in the event of a family emergency, [Jethro] may only travel overseas during the time that he is with the travelling parent during the Christmas holidays. The parent wishing to travel overseas with [Jethro] shall provide to the other parent a copy of return airfare tickets, travel itinerary and contact details with two months' notice of the intended period of travel. The other parent shall not unreasonably withhold consent. An example of a family emergency might be the impending death of a close family member, the funeral of a close family member or some such other emergency of a like nature.
- (xiv) [Jethro] shall attend a primary school in [town B] nominated by Mr [Drake]. His parents shall consult and determine together his next schools after that.

- (xv) In the event that either parent wishes to engage in therapy that also involves [Jethro], they shall be free to do so provided that they have first notified the other parent of their intention to do this and have provided the full contact details of the therapist in question. In the event that either parent wishes to engage in therapy with [Jethro], a copy of this judgment is to be provided to the therapist in question, on the understanding that it is not to be shared by the therapist with any other person without first obtaining the approval of the Court.

Communication

- (xvi) When communicating with each other, be it in person or via some medium, all communication will be polite and respectful. The parents may agree on a form of communication, but in the absence of agreement they shall both download, pay for and communicate via OurFamilyWizard.

Conditions

- (xvii) The parents are not to discuss adult conflict or care arrangements in front of [Jethro] or within [Jethro]'s hearing. The parents will speak to each other in an effort to encourage harmonious communication and to avoid conflict.
- (xviii) Each parent is to display a photo that depicts [Jethro] and the other parent together, in [Jethro]'s bedroom, in a place where he can readily see it. Each parent should supply the other with a hard copy of the photo they want to have displayed together with a suitable frame. The photo should not be greater than A4 size.

[134] [Jethro]'s lawyer, and only [Jethro]'s lawyer, has leave to come back to me to seek any clarification around the terms of this parenting order. Any submissions around costs contribution orders are to be filed within 28 days.

Judge AS Greig

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 11/04/2023