

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

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**IN THE FAMILY COURT  
AT TE AWAMUTU**

**I TE KŌTI WHĀNAU  
KI TE AWAMUTU**

**FAM-2011-057-000171  
[2023] NZFC 3214**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[AINSLEY TANNER] Applicant
AND	[CORY SWANSON] Respondent

Hearing: 23 March 2023

Appearances: C Going for the Applicant  
R Holz for the Respondent  
J Niemand as Lawyer for the Child

Judgment: 4 April 2023

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**RESERVED JUDGMENT OF JUDGE N J GRIMES**

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[1] [Hailey] is a 12-year-old girl who has only ever lived with her mother. Her contact with her father has been governed by a parenting order dated 9 October 2018 providing for fortnightly weekend contact together with additional time during the school holidays.

[2] Concerned that Mrs [Tanner] planned to relocate [Hailey] to [location deleted], Northland where her parents had brought land, Mr [Swanson] successfully obtained an order preventing [Hailey] from being removed from the jurisdiction of the Hamilton Family Court in 2016.

[3] Mrs [Tanner] has always wanted to relocate to live on her parents' land which would ultimately be hers and then pass down to [Hailey]. For the past 18 months, relocation had become a serious proposition of which [Hailey] was made aware but Mr [Swanson] was not.

[4] It was not until November 2022 that Mrs [Tanner] discussed relocation with Mr [Swanson] who was firm in his text communication that while he did not agree to relocation, he was happy to attend mediation to discuss [Hailey].

[5] Without Mr [Swanson]'s knowledge, Mrs [Tanner] started the relocation process in early January 2023 and advised him on 23 January 2023 that she, her husband [Sean Tanner] (who has taken Mrs [Tanner]'s last name), 8-year-old [Brandon] and [Hailey] had relocated to [Northland].

[6] Mr [Swanson] commenced without notice proceedings on 15 February 2023 when he, on an unrepresented basis, applied to enforce the existing 2018 parenting order by admonishing Mrs [Tanner]. That application was declined and was not to be served on Mrs [Tanner] until Mr [Swanson] had the opportunity to file further evidence in support of his application.

[7] On 17 February 2023 Mr [Swanson] made without notice applications to vary the parenting order dated 9 October 2018, for a warrant to enforce the role of providing day-to-day care, costs of contravention and to settle a dispute between guardians as to schooling.

[8] An interim order was made on 17 February 2023 granting Mr [Swanson] the role of providing day-to-day care of [Hailey] with Mrs [Tanner]'s contact to be every second weekend. Mrs [Tanner] was responsible for travel to and from contact with [Hailey]. Further, an order was made for [Hailey] to attend [name of school deleted].

[9] While a warrant was issued, it and interim parenting order were directed to lie in court to give Mrs [Tanner] the opportunity to comply with the terms of the order and return to Hamilton with [Hailey]. If she did so by 12 noon Monday, 27 February 2023, then the care arrangements would remain governed by the 9 October 2018 order.

[10] Mrs [Tanner] did not comply with the court's directions but did instruct counsel. On 28 February 2023 her Honour Judge Morrison directed counsel for Mrs [Tanner] provide to the court by 3 pm confirmation that her client would comply with the directions and the timeframe in which she proposed to do so. Mr Niemand, who had been appointed as lawyer for [Hailey], was asked to provide a summary of his enquiries within the same timeframe.

[11] As Mrs [Tanner] did not comply with the court's directions, her Honour Judge Morrison directed on 1 March 2023 that the warrant to enforce the interim parenting order was to be executed. Further protective conditions to the interim parenting order dated 20 February 2023 were added given the nondisclosure of family harm incidents in Mr [Swanson]'s home. A Pickwick hearing was directed.

[12] On 1 March 2023 Mrs [Tanner] applied without notice to discharge the non-relocation order, resolve the guardianship dispute, discharge the interim parenting order and to vary the parenting order to provide for [Hailey] to remain in her care. Those applications were placed on notice to be dealt with at the Pickwick hearing on 6 March 2023.

[13] From 28 February 2023 to 2 March 2023, three attempts were made by police to execute the warrant. On 3 March 2023, the police executed the warrant, however [Hailey] ran away from her father's vehicle and the police returned her to Mrs [Tanner].

[14] On 6 March 2023 I directed Judge Morrison's orders and directions remain in place and that the police were to uplift [Hailey] from Mrs [Tanner]'s care. I varied the interim parenting order to include a condition that no person was to video or record the uplift, this being a matter of concern. I required the matter be recalled later that day to obtain a further update from Mr Niemand.

[15] At the recall of the matter, I again reiterated that the orders remained in force and summonsed the officer in charge to explain what steps would be taken to execute the warrant. I authorised Mr Niemand to appoint an agent to meet with [Hailey] in an independent setting for the purposes of fulfilling the obligations under s 6 of the Care of Children Act 2024 (“the Act”).

[16] When the matter came back before the court on 9 March 2023, the police were in attendance by MS teams. Having reviewed their correspondence, I accepted the warrant had been executed in terms of section 73 of the Act because [Hailey] had been delivered by the police to her father. The fact that [Hailey] then absconded from her father’s care did not alter the fact that the warrant had been executed.

[17] I adjourned the applications to a short cause hearing on Thursday, 23 March 2023. While the interim parenting order providing for [Hailey] to be in her father’s day-to-day care remained in place, contact between father and daughter was organised on the basis that Mr [Swanson] would not retain [Hailey].

[18] The issue for this hearing was the interim care arrangements for [Hailey] given the competing applications before the court. Other applications being the long-term care arrangements, schooling and costs will require a substantive hearing unless matters are resolved by consent.

[19] Mrs [Tanner] and her counsel attended the hearing by MS teams. By consent Mrs [Tanner] was supported by her husband and likewise Mr [Swanson] was supported by his wife [Rosaline Swanson]. The parties were sworn in and cross-examined. I received written submissions from counsel and an update from Mr Niemand.

## **The law**

[20] *Fletcher v McMillan*<sup>1</sup> sets out several observations about the approach to be adopted by the Court when dealing with an application for an interim parenting order. These observations related to the provisions of the Guardianship Act 1968 but remain

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<sup>1</sup> *Fletcher v McMillan* [1996] NZFLR 302.

valid in respect of proceedings under the Care of Children Act 2004. Hammond J noted the following matters:

- (a) The only applicable principle of law was that the best interests of the child were paramount.
- (b) The Court's function on an interlocutory application was a limited one. It was to decide what was to be done pending full investigation and hearing.
- (c) An interim parenting hearing was not held to inquire into and determine factual allegations.
- (d) The hearing in principle should be relatively short and focussed.
- (e) It was rare to resolve serious differences as to fact or to weigh the prospective merits of each parent. Those merits were to be determined at the substantive hearing.
- (f) An interim custody order was only to be used to advance matters as quickly as possible to the substantive hearing.
- (g) The purpose of an interim custody order was to decide what was to be done pending the full investigation and hearing. Preservation of the status quo for the trial was the usual outcome. Assuming there was a state of affairs in respect of the child which could properly be described as "status quo", then that should not be disturbed unless the welfare of the child, using that term in its largest sense as covering physical, mental or moral matters, was distinctly put at risk.

[21] In *K v K*, Keane J reviewed the law relating to applications for interim custody orders under the Guardianship Act 1968<sup>2</sup>. He observed that interim orders were usually made where there was a sudden state in volatility, at short notice, and often on

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<sup>2</sup> *K v K* [2009] NZFLR 241.

slight facts the Court might be asked to intervene. In those circumstances, all the Court could do by way of interim order, until the parents reached of their own accord, or the Court was able to make a complete and considered review of the child's welfare and best interests required, was to give a child a measure of stability. This usually meant confining the child to the child's most familiar and reliable caregiver, and then provisionally.

[22] In *Sime v Redshaw*, Heath J reviewed the approach to be adopted by the Court when dealing with applications for interim orders, he noted the observations made in *Fletcher v McMillan* and *K v K* and concluded the essential question to be determined was whether an interim custody order was required to safeguard and preferably promote the welfare of the children on the basis that the making of an order simply could not be postponed<sup>3</sup>.

[23] Overarching all this are ss 4-6 of the Act. Section 4 requires me to consider the welfare and best interests of [Hailey] as the first and paramount consideration in her individual circumstances. I need to make decisions appropriate to her 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 [Hailey].

[24] I must also have regard to the specific provisions in s 5 when considering what is in [Hailey]'s best interests and welfare, which includes ensuring that she is kept safe, and in particular from all forms of violence.

## **Discussion**

[25] In making my decision, I have taken the following into account:

### *Status Quo*

[26] [Hailey]'s status quo is living in the Hamilton region with her mother. Until January 2023 she had lived there all her life and it is where she has had her schooling

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<sup>3</sup> *Sime v Redshaw* (2005) 23 FRNZ 912.

and developed friendships. I do not accept the submission that the status quo has changed to [Northland].

[27] [Hailey] has only ever lived with her mother who has provided most of [Hailey]'s care throughout her life. There appears to be no contest that [Hailey]'s primary attachment and bond is to her mother.

[28] Mrs [Tanner] is adamant she is unable to return to live in the Hamilton region. Her rental accommodation is gone, and her husband has employment as a [profession deleted] in [Northland]. Further she states any return by her and [Hailey] would dislocate her family and cause extreme financial hardship. Therefore, if [Hailey] returns to [the Waikato], it will be to live with her father thus disrupting [Hailey]'s continuity of care (living with her mother).

#### *Safety Matters*

[29] Having worked on relationship and alcohol-related issues in his household, Mr [Swanson] is concerned that [Hailey]'s view of his household being unsafe is over inflated. He believes he has provided sufficient evidence that the concerns [Hailey] has have been addressed. This has included nine months of counselling in 2021, relationship counselling this year, ceasing all alcohol consumption and waiting for alcohol counselling.

[30] The concerns raised about Mr [Swanson]'s household are:

- (a) In 2021, Mr [Swanson] was diagnosed with depression but had stopped taking his medication after a month supposedly on the advice of his doctor. He started counselling in March 2021 for primary mental health support regarding his anxiety.
- (b) On 22 October 2021, there was a police callout during an argument over finances with Mr [Swanson] refusing to give baby [Tama] to Mrs [Swanson]. He admits getting an axe from the laundry and placing it by the front door. [Hailey] was present in the home, saw the axe by the

door and was spoken to by the police. A police safety order was issued against Mr [Swanson]. Mr [Swanson] continued with his counselling until December 2021 when the counsellor considered that it was no longer necessary because Mr [Swanson] had developed effective emotion regulation skills which he was consistently applying.

- (c) In September 2022, [Hailey] was interviewed by Oranga Tamariki social worker in relation to alleged inappropriate touching (unrelated to the parties). During the course of Oranga Tamariki's involvement, [Hailey] disclosed she was upset by the arguments in her father's home. Mr [Swanson] confirms he spoke with the social worker about this and while support was offered, he informed them that he and Mrs [Swanson] were already arranging counselling. Mr [Swanson] acknowledged at the hearing that arguments were occurring in front of [Hailey] and counselling has only been instigated this year. [Hailey]'s reticence to attend contact surfaced after this and was the subject of a meeting between the adults in November 2022 discussed below.
- (d) On 22 December 2022, Mrs [Swanson] called police after Mr [Swanson] arrived at the address intoxicated after his end of work function earlier in the evening. Mrs [Swanson] reported Mr [Swanson] being verbally argumentative. Mr [Swanson] left the address without further action required by the police. While [Hailey] was not present, she arrived the next day for her Christmas contact. In messages with her mother it is clear she was aware of the tensions in her father's home and that these could impact on her Christmas Day causing her to be upset.

[31] While Mr [Swanson] has (belatedly) taken steps to address the tension in his household, I find he was failed to appreciate the impact the October 2021 incident had on [Hailey]. Getting an axe and putting it by the front door is not normal behaviour. Nor is it normal for police to be called during a couple's argument. That happens when someone is scared. Mr [Swanson] has, I find, failed to consider that subsequent



arguments may remind [Hailey] of the October 2021 incident and worry her that it will be repeated.

*Mrs [Tanner]'s conduct*

[32] Mrs [Tanner] says she tried to discuss the issue of relocation with Mr [Swanson] at a November 2022 meeting held to discuss [Hailey]'s ambivalence about contact. Further, she organised family dispute resolution for which Mr [Swanson] failed to pay his half share meaning it could not go ahead. Despite taking these steps, she unilaterally relocated knowing this was in breach of the court orders. On her own evidence, the relocation had been seriously considered for the past 18 months and then actioned against Mr [Swanson]'s known opposition.

[33] Having been through the Family Court for two years after Mr [Swanson] had originally obtained an order preventing removal from the region, I do not accept Mrs [Tanner]'s evidence of not appreciating the need to apply to the court to resolve the dispute between guardians as to residence. Her actions were deliberate in nature. The court does not condone this behaviour.

[34] [Hailey] has picked up from her mother that court orders are there to be broken. [Hailey]'s own behaviour in not complying with the execution of the warrant reflects her mother's poor role modelling in this regard. In order for [Hailey] to appreciate that rules and orders are in place for a reason, a return to Hamilton and into her father's care would be appropriate.

*[Hailey]'s relationship with her parents and whanau*

[35] If [Hailey] stayed in [Northland] then she would remain living with her mother, stepfather, and eight-year-old brother. Her maternal grandparents live on the same block of land meaning those relationships would continue to be preserved and strengthened.

[36] As well as her relationship with her father, [Hailey] has a relationship with Mr [Swanson]'s two-year-old son [Tama], his wife [Rosaline] and [Rosaline]'s mother

[Dawn]. These relationships are important to [Hailey]. As [Northland] is a seven and a half hour drive from Mr [Swanson]'s home, that distance makes fortnightly contact unrealistic thus putting a strain on those relationships. While they may be preserved, it is possible they will not be strengthened.

[37] There is a concern that Mrs [Tanner], having shown little regard for the court orders, will not support, promote and protect the relationship between [Hailey] and her father. While she is adamant she will do so, pointing to the fact that she had continued to do so for the past 10 years, her recent behaviour remains a concern to Mr [Swanson], Mr Niemand and myself.

[38] Mrs [Tanner] acknowledges she makes all guardianship decisions about [Hailey], referencing Mr [Swanson]'s lack of communication with her. This however does not abdicate her responsibility to consult. Further, the lack of inclusion of Mr [Swanson]'s details on two recent school enrolments does little to foster the concept of Mr [Swanson]'s importance in their daughter's life.

*[Hailey]'s views*

[39] [Hailey] has expressed firm views both in her actions (running away from her father) and in her words to Mr Dodds acting as agent for Mr Niemand. Mr Dodds, a senior Lawyer for child described [Hailey] as presenting as personable, intelligent and articulate. She gave him the impression of being reasonably balanced and, at least in his layperson's view, not significantly influenced by her mother in terms of her views relating to her relationship with her father.

[40] In summary [Hailey] reported:

- (a) That her views were her own and that she "is not a puppet".
- (b) She really enjoys [her new school] finding it easier to concentrate on her work and has made friends.
- (c) She loves the immediate access to the beach, wharf and in particular her two horses and others on her maternal grandparents' property.

- (d) Her life had significantly improved in the north particularly as to schooling and access to horses. She had no difficulty with the relationships with her stepfather, brother and grandparents.
- (e) While [Hailey] loves her father and wants to maintain a relationship with him, she acknowledged this has been impacted by her reaction to the constant low level arguing between her father and [Rosaline]. She believed this had gone on for a long time with the arguments making her feel uncomfortable and a little bit unsafe.
- (f) Her relationship with her father has, from her perspective, been impacted by her New Year visit when [Hailey] felt uncomfortable staying at [Rosaline]'s family beach house in [location deleted] and [Rosaline]'s attitude to her. [Hailey] made arrangements to be picked up early and reported that her father told her not to come back until she sorted her "shit out". As a result, [Hailey] sent her father a text on 3 January 2023 letting him know she did not feel welcome or comfortable, suggesting they have a break but that she still loved him.
- (g) She wants a relationship with her father and wants to work with him on improving it.
- (h) She was firm in her views that she could never live full-time in her father's household, that she could not manage it and nor could she cope with it.
- (i) Her father had agreed to her moving up north when the discussion between the adults took place in November 2022. She had gone to comfort her father as he was upset and she had understood him to agree she could go but asked her to stay in contact.
- (j) Being disappointed that her father did not listen to her about the distress she felt when the warrants were being executed.

## Outcome

[41] This is a finely balanced case. On the one hand a clear breach of court orders should not be seen to be rewarded if [Hailey] is able to remain living with her mother in [Northland]. On the other hand, [Hailey] has expressed very firm views both by her actions and words as to the outcome she seeks.

[42] I have therefore determined that given the paramountcy principle that [Hailey]’s welfare and best interests in her particular circumstances must be my first and paramount consideration, that these are best served by her remaining living with her mother in [Northland] for the following reasons:

- (a) Section 6 of the Act requires me to take [Hailey]’s views into account. While I acknowledge that the prospect of relocation to [Northland] has been on the cards for a considerable period of time and may have influenced [Hailey]’s views, so too has the acknowledged difficulties in Mr [Swanson]’s household that she has witnessed. I do not link the deterioration of [Hailey]’s relationship with her father with her knowledge of relocation. Rather, Mr [Swanson], while minimising the arguments in his home, acknowledges they have occurred. Police involvement in October 2021 and December 2022 satisfies me that the arguments are not as “low-level” as he would like the court to believe. The regularity of them has clearly caused [Hailey] upset for the reasons set out above.
- (b) While a return to the Hamilton region would restore the status quo as to location, it would break [Hailey]’s continuity of care, she having only ever been parented by her mother and spent no more than three weeks at a time in her father’s care.
- (c) While there is some concern Mrs [Tanner] may not comply with Court orders regarding [Hailey]’s contact with her father, I am cautiously optimistic she will do so given her evidence of compliance with contact for the past 10 years. Mrs [Tanner]’s financial circumstances are

strained but she has assured the Court she can and will fund [Hailey]'s travel to and from Hamilton. Mrs [Tanner] is on notice that a failure to comply will inevitably result in further court proceedings, consequences and potential reversal of care.

- (d) There is the practical consideration of the difficulty in enforcing an order that required [Hailey] to live with her father in Hamilton, given [Hailey]'s distress at the execution of the warrants.

[43] I appreciate that Mr [Swanson] will be most disappointed by this decision. He is entitled to rely on court orders and entitled to have these enforced. As he will understand from this decision however, the paramountcy principle must be applied and in [Hailey]'s circumstances, remaining in [Northland] with her mother is what is best for her while the substantive applications await determination.

[44] This remains an interim arrangement while the substantive applications are resolved through the court process. Rather than timetable those applications now, I will give time for the parties to reflect on what has occurred, bed in the new arrangements, work more cooperatively together than they have in the past and come back to the court to a prehearing conference to timetable the matter to a hearing.

### **Orders and directions**

[45] I discharge:

- (a) The parenting order dated 9 October 2018 as varied on 20 February 2023, 28 February 2023, 6 and 23 March 2023.
- (b) The interim order under s 46R dispute between guardians dated 20 February 2023.
- (c) The s 46R order as to schooling dated 21 December 2016.
- (d) The s 46R order as to residence dated 26 September 2016.

[46] I make a new interim parenting order providing for [Hailey] to be in her mother's day-to-day care. Mr [Swanson]'s contact with [Hailey] will occur in the Hamilton area and shall be on the following terms:

- (a) For term 1 school holidays 2023, from 5 pm 7 April 2023 to 10 am 20 April 2023.
- (b) For all other school term holidays from 4 pm the day after school finishes for 10 nights ending at 10am on the 11<sup>th</sup> day.
- (c) For the third and sixth weekends in every school term from Friday until Sunday at noon. Where there is a public holiday in a school term, then it will replace either the third and/or sixth weekend meaning Mr [Swanson]'s contact is extended to noon on the day of the public holiday.
- (d) Summer holidays are to be shared equally between the parties with Mr [Swanson] having [Hailey] every odd numbered year from 4 pm on the second day of the summer holidays and in even numbered years for the second half of the holidays ending three days before the commencement of the school term.
- (e) Mr [Swanson] and [Hailey] may communicate with one another through their phones/social media at reasonable times of the day.
- (f) There shall be such other contact as agreed between the parties.
- (g) Mrs [Tanner] is responsible for the cost of and arranging all travel for [Hailey] to and from [her father's home].

[47] Conditions:

- (a) The parties record the recognition of each other as guardians to [Hailey] and commit to prior consultation with each other on all guardianship issues and any issues affecting [Hailey]'s care arrangements.

- (b) The parties will communicate with each other by phone call at first instance but otherwise by text or email.
- (c) No person having the care of [Hailey] may consume alcohol above the legal limit for driving when she is in their care.
- (d) [Hailey] is not to be exposed to family violence as defined in the Family Violence Act 2018.
- (e) No person having the care of [Hailey] is to discuss adult matters including details of allegations made in these proceedings with her or expose her to derogatory remarks about any other member of her extended family.

[48] These proceedings are adjourned to a prehearing conference at a date and time to be advised:

- (a) Five days before the conference, Mr Niemand is to update the Court on [Hailey]'s views and circumstances. He is authorised to engage Mr Dodds to meet with [Hailey].
- (b) Counsel are to file memorandum three days before the prehearing conference setting out their respective clients position, issues to be determined, timetabling directions required and estimated length of hearing time.

N J Grimes  
Family Court Judge