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

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IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2013-009-002343
[2023] NZFC 3367

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[JUDY MAIAVA] Applicant
AND	[FRASER LYNDON] Respondent

Hearing:	31 March 2023
Appearances:	N McVicar for the Applicant C Hodgson for the Respondent M Rout as Lawyer for the Children
Judgment:	31 March 2023

ORAL JUDGMENT OF JUDGE S M R LINDSAY

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[1] [Judy Maiava] and [Fraser Lyndon] are the parents of [Madeleine], turning 12 on [date deleted] 2023, and [Grace], born [date deleted] 2016 and aged [6]. I had the pleasure of meeting [Madeleine] and [Grace]. I met these delightful young tamariki on the morning of their parents' Family Court fixture. At the commencement of the hearing I conveyed to the parties their lovely daughters' views on the primary issue that I am asked to determine.

[2] Very early at the judicial interview [Grace] was quick to tell me she wanted to remain in [location A]. It was later in our meeting that [Madeleine] told me she wanted to remain living in [location A] where the children have been living now since late 2020. It was not always the way. The children now voice a preference to live in [location A] but it is only over time as their mother forged a new life in [location A] it has become their day to day world.

[3] The primary issue is what will best serve the children's welfare and best interests? Specifically I am asked to determine findings of credibility as to whether:

(a) The respondent essentially acquiesced to the children's relocation to [location A]; and

(b) Now, the children having lived in [location A] since late 2020, whether they should remain living there?

(c) The effect on the tamariki of the continuing state of conflict between the parents ([Judy] and [Fraser]).

(d) Given the distance between the parties homes, what of the tamariki's future contact and care?

The law

[4] The primary issue for determination is what care arrangements best serve [Madeleine] and [Grace]'s welfare and best interests and I would like to reference s 4 of the Care of Children Act 2004. Specifically I must settle the children's future contact and care ensuring that these lovely young girls are protected from all forms of violence.

[5] The evidence was multi-faceted. But, for the applicant, she asked the Court to focus on the children's physical and psychological wellbeing. The applicant is a protected person. A protection order issued in her favour in 2013. The applicant alleges she feels unsafe and is vigilant to ensure the children's safety in the respondent's care.

[6] In support of her preference to remain living in [location A] the applicant claims she was motivated to promote the children's psychological and physical safety but also to advance their knowledge of tikanga, whakapapa and access to Te Ao Māori. I believe the parties prefer I now refer to [location A – English name] as [location A – Māori name] throughout my decision.

[7] The principles at the heart of [Madeleine] and [Grace]'s future care arrangements include:

(a) The children being protected from all forms of violence.[1]

(b) The children should have continuity in their care, development and upbringing.[2]

(c) The children should continue to have continuity, should continue to have a relationship with both parents and their relationship with their family group, hāpu and iwi to be preserved and strengthened.[3]

(d) And a significant consideration advanced also as a protective factor for the children both now and into the future is that their identity be preserved and strengthened.[4]

[8] The remaining principles fall away to these overriding primary concerns or issues. However, they still require consideration by the Court and having met with the children their expectations are that their care, development and upbringing shall be primarily the responsibility of the parties - their parents and guardians - and it is common ground between the parties that [Madeleine] and [Grace] will continue to be in their primary care although the parties have been unable to agree on their children's future care arrangements.

[1] Care of Children Act 2004 s 5(a).
[2] Care of Children Act 2004 s 5(d).
[3] Care of Children Act 2004 s 5(e).
[4] Care of Children Act 2004 s 5(f).

[9] In principle the parties would agree [Madeleine] and [Grace]'s care, development and upbringing should be facilitated by ongoing consultation and cooperation between them as parents and guardians.[5] However, following final separation, trust between the parties was fragile and with the children's unilateral relocation in March 2020, but again a second relocation of the children by the applicant, or perhaps more correctly a unilateral retention of the children by the applicant, put more pressure on the parties' parenting relationship. The parties' evidence is at odds over the extent of the applicant's challenge as to the children's safety in the care of the respondent. But both accept the children must be protected from all forms of violence.

[10] The respondent has countered in his evidence that the applicant's reliance on the protection order made back in 2013 does not reflect a complete history of the parties' relationship. The respondent submits following the making of the protection order he did not defend the proceedings. The parties had reconciled. The final protection order issued by operation of law and in the absence of his evidence in response. The parties were a couple for many years and went on to have [Grace]. But at the heart of the respondent's case is his submission is the applicant's reference to, and reliance on, the protection order is something of a sword rather than a shield. The respondent acknowledges the applicant's talent and commitment to the children's identity being preserved and strengthened. The applicant challenges the respondent to take a lead role in growing in his knowledge base of Te Reo Māori. There can be no denying the respondent's evident pride as he acknowledged at hearing [Madeleine] and [Grace]'s growing mastery of their reo. This is also recorded in his affidavit evidence.[6]

[11] The respondent acknowledges although he may not offer the same parenting experience in terms of access to the children's existing [name of school deleted] or to marae-based experiences or satisfying at the applicant's level a knowledge and wealth of tikanga on a daily basis, he is certainly committed to the same:

> I believe it is in [Madeleine] and [Grace]'s welfare and best interest that their relationships with all of their whanau and iwi are preserved and strengthened.

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[5] Care of Children Act 2004 s 5(c).
[6] Updating affidavit of the respondent, sworn 22 November 2022, paras 11 & 12.

> I am excited about reconnecting with [name of iwi removed] and going on this journey with [Madeleine] and [Grace].

[12] I mentioned to the parties there are some beautiful passages in the affidavit evidence with a focus on the applicant and her commitment to the children absorbing the world of Te Ao Māori:

> The girls are not only supported by myself but also by my whanai whanau, including my tuakana [Anahera] and her tamaiti, [Kahurangi] and [Marama], Mama [Lindsey], Papa [Mitchell], iramutu [Waimarie] and her tamahine [Ngaio]. [Details deleted] Our tamariki are all enrolled in Kohanga Reo with our school aged tamariki all attending Te Aho Matua together. The wāhine in our whanau are all employed by Kohanga Reo and Kaupapa Maori initiatives within the hapori. Collectively, we support and embrace [Madeleine] and [Grace] in their identity as young Mareikura Maori. Te ao Maori is reflected strongly as their world view, starting in our own kainga, and demonstrated throughout our whanau, their peers and the wider supporting hapori.[7]

[13] There is a keen sense the parties each anticipate [Madeleine] and [Grace] mana tamaiti shall flourish and the children shall be future leaders.

[14] Section 6 of the Care of Children Act enables [Madeleine] and [Grace]'s views to be expressed to the Court. In paragraph (a) in June 2022 lawyer for the children instructed an agent to speak directly with them in [location A]. The meeting was arranged at their school in [location A]. The children talked together with lawyer for child's agent. The children said things were good at home and they enjoyed living with their mother in [location A]. There was regular holiday contact with their father which they enjoyed and they liked his partner who they described as cool.

[15] The children wanted to see their father more and were disappointed or highlighted that previously they had spent two weeks with their father but this more recently had been reduced to one week. The children wanted to go back to spending more time with him in [location B].[8]

[16] Mr Sandom recorded at that time:

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[7] Updating affidavit of applicant, sworn 3 November 2022, para [9].
[8] Report of J Sandom, lawyer for child's agent, 20 June 2022.

> Neither child expressed a preference for living in [location A] or [location B] ... there was no clear view expressed by either child that they preferred living with one parent more than the other.[9]

[17] By hearing in late March 2023 the children's views have formed or expressed as a clear preference to remain living with their mother in [location A]. When I met the children they made light of any inconvenience of the regular and long car trip to see their father in [location B].

[18] These Family Court proceedings were initiated by [Judy Maiava] in March 2020 when she applied for a parenting order. The application was directed by Judge Flatley to proceed on notice but with urgency. Judge Flatley did not find the threshold met for the making of an order on a without notice basis. There was a delay in the proceedings being served on the respondent.

[19] By application dated May 2020 the respondent applied without notice for an application to vary an existing parenting order. He sought a warrant to enforce the terms of a parenting order and a without notice application to settle a dispute between guardians. The applicant had unilaterally relocated the children to [location A]. The respondent had been having problems reaching the children by telephone but when he finally got through and made contact one of the children burst forth with: "*We now live in [location A] Daddy"*.

[20] The wider background to this development was from separation, or at least late 2019, the respondent had enjoyed unsupervised contact with the children on a weekly basis: on Week 1 from Thursday evening through to Saturday morning and on Week 2 from Friday evening through to Sunday evening, although the parties debate somewhat in the evidence the frequency of this regular contact arrangement.

[21] Late in February 2020 the applicant approached the respondent explaining she wanted to move to [location A] as she had support from her whāngai mother, [Anahera]. The respondent told the applicant he would not consent to the children being removed from [location B] and the respondent was circumspect about the applicant's reasons for wanting to move/relocate to [location A] and calling upon

[9] Report of J Sandom report dated 20 June 2022.

emotional support from her whāngai whānau. He referenced a break in contact between the applicant and whānau based around [location A]. The respondent also pointed to the applicant's disruption to his contact and care with [Madeleine] and [Grace] was more likely to *"punish me for moving on"* from the parties' relationship.

[22] The respondent filed response evidence (sworn 22 May 2020) and at that time he had last seen the children around five weeks before the national level 4 lockdown in March 2020. The respondent's evidence pointed to the applicant undermining his contact with the children and with a purpose of distancing him emotionally from them. The applicant submits her experience of family violence in the relationship with the respondent leaves her fearful and motivated out of a strong need to ensure the children's safety is promoted and at all times they are safe.

[23] However, the parties had, previous to that point, negotiated, with legal advice, an agreement as to interim contact and care. A move during the national lockdown and without consultation between guardians and the other parent who was active in his contact and care of the children seems something of a cynical move.

[24] The respondent's evidence was during the alert level 4 national lockdown the applicant had told him his "bubble" was compromised and he could not see the children until the nation entered into level 3. The respondent understood that over the lockdown period the children's care would be limited to their mother only. The applicant breached government imposed restrictions by travelling or making the hīkoi to [location A] and expanding the children's bubble with others.

[25] The parties went on to discuss what was to happen next and there was involvement by counsel. The applicant advised she would return to [location B] once the nation moved into level 2. [Madeleine] would return to [her previous school] and [Grace] would be enrolled into early childcare. The applicant returned to [location B] on 3 June 2020. With the children's return this brought the dispute between the guardians arising out of the applicant's unilateral move of the children during level 4 to an end. His Honour Judge Murfitt recorded in a minute dated 22 June 2020:

> The prospect of the children being relocated to [location A] is now historical and the issue for the future is the care arrangements for the children. The

> parties have been able to agree on an interim contact plan in which the girls spend two nights with their father, subject to a condition that his partner is not present. (The future of that condition will need to be sorted out as well.)

[26] On 8 July 2020 an interim parenting order issued by consent confirming the children in their mother's care and contact with their father on a weekly basis:

(a) Week 1 - from Friday pickup from after school and preschool until Monday drop-off at school and preschool.

(b) Week 2 - from Wednesday, pickup after school and preschool until Friday drop-off at school and preschool.

[27] There was also provision for school holidays and other important conditions attached to contact and care.

[28] Although the parties had somewhat, on a stop/start basis, managed post-separation to co-parent effectively the respondent also did perceive a shift by the applicant that coincided with the strengthening of his new relationship. The applicant denies this and voiced safety concerns about the respondent and his partner.

[29] On 19 September 2020 the applicant and her brother had a fight. The applicant was scared her brother would return and attack herself and the children. It is accepted by the respondent the applicant's brother is a dangerous person and the respondent was also prepared to heed the applicant's concern and proposal that she relocate before the end of 2020 with the children to [location A]. At this point the parties' evidence varies. The respondent's evidence being he agreed for the children to remain in [location A] for a year. The applicant denies any such agreement.

[30] The respondent and his partner supported the applicant with the move. The respondent made two trips to [location A]. In the second he travelled alone to help shift or move their possessions. This was because his vehicle had a towbar.

[31] When did this agreed change in city from [location B] to [location A] go awry between the parties? The applicant points to the history of partner violence and the insidious effect of family harm to herself and the tamariki. For the respondent he

points to the applicant clarifying in February 2021 she had no intention of returning the children to [location B] or in the future sharing in the children's care. From February 2021 the parties' relationship took a step backwards and with every missed phone call between the respondent and the children, or correspondence between counsel over ongoing uncertainty as to whether the contact would occur between the respondent and the children, the parties' parenting relationship is now in tatters.

[32] The respondent's case is the applicant manipulated him to support her move to [location A] and actively support relocating [Madeleine] and [Grace]. What did the respondent believe would take place following the girls' move to [location A] in late 2020? The respondent's evidence is the parties agreed the applicant relocate for one year and after one year the children would return to his care and remain living in [location B]. The applicant denies this claim.

[33] In an oral judgment of Her Honour Judge McMeeken, dated 9 July 2021, she recorded a concern that the girls' contact with their father was not settled. At a round-table meeting the respondent had made it clear he did not agree to the children remaining in [location A] permanently and he anticipated the children's return. Her Honour Judge McMeeken noted it was to the credit of the parties, and assisted by the lawyers, that despite a disagreement over the substantive issue as to where the children live long term, an interim parenting order as to contact could be made by consent. That order provided the parents share in the children's day-to-day care but in a defined way. Judge McMeeken noted that essentially the girls would be in the respondent's care for all of the school term holidays and three weeks of the Christmas holidays. There was also provision for contact during weekends and over long weekends in [location B].

[34] In April 2022 the Court directed a submissions-only hearing of one and a half hours take place in July 2022. At a short cause hearing on 12 September 2022 His Honour Judge Greig made directions as to the respondent's interim contact. Judge Greig directed the respondent's proposal for contact pending the substantive hearing, be adopted. This meant the children would have contact with their father in [location B] on the second, fifth and eighth weekend of each school term and with weekends to incorporate public holidays if they fell on a contact weekend.

[35] Judge Greig also directed for two weeks of the school term holidays the children were to be in the respondent's care. It was a condition of the parenting order the applicant be held responsible for transporting the children to and from [location B] or meeting the cost of flights. Christmas holidays were to be shared between the parties with each parent having the children in their care for three weeks, the children's position being they had wanted to see more of their father than they had up until that point and it was noted by the Judge that prior to the relocation to [location A] the children had been seeing their father weekly.

[36] Judge Greig commented in his September 2022 decision that on the face of it the applicant's case that the respondent consented to the children moving permanently to [location A] looked a little weak. The context of this being the respondent had previously launched litigation in an effort to have the applicant return the children from [location A] back in 2020.

[37] I have had the benefit of reviewing not only the parties' affidavit evidence but also observing their evidence at hearing. The overwhelming evidential picture supports the respondent's account that he responded to the applicant's concern about her safety and that of the children at the hands of her brother who both accepted posed a risk. The parties were then sharing a positive parenting relationship and in that context it seems entirely possible that the applicant, intent on relocating the children to [location A], entered into an agreement, at least on the face of it, with the respondent that in 12 months the children would return to live with their father and she would exercise contact. I add, given the strength of the respondent's involvement in parenting the children and his commitment to exercising regular contact, it lacks plausibility that this respondent, who in April 2022 took legal steps to curtail the applicant's then unilateral relocation of the children to [location A], just some five or six months later would agree to the children's permanent relocation to [location A] and without a clear pathway for his long term and settled contact and care.

[38] Nor do I think the parties were talking at cross purposes over the children's proposed relocation to [location A] and what might happen in 12 months. The overwhelming impression is the applicant was motivated and she is a parent who does not leave things to do with the children to chance. I tend to accept the respondent's

evidence. He thought he was responding in a supportive way to a threat levelled at the applicant but ultimately anticipated or expected a reciprocity in his care of the children with contact moving over to the applicant.

[39] The respondent sustained cross-examination by counsel as to how unrealistic it was by him to assume the children return to [location B] after a year and potentially spend a year-about between the parties' homes. The respondent's evidence as to [Madeleine] having moved school at the applicant's direction reinforced his point that given this had already been a feature of [Madeleine]'s schooling it seemed less disruptive that [Madeleine] move between two school environments and over each academic year, meanwhile maintaining friendships with the children or tamariki in both school environments.

[40] It was relevant to the respondent that he has been able to maintain [Madeleine] and [Grace]'s social relationships with other children and whānau and it is relevant the parties were, in late 2020, getting on and to such a degree the respondent physically helped with the move. It is common ground the respondent assisted with the applicant's move and for the benefit of the children, but I am in no doubt he did not support the applicant's unilateral retention of the children in [location A].

[41] The examination of any children's care arrangements is fact-specific and each family arrive at a care arrangement that best fits for them. There are a vast array of parenting arrangements to be found around Aotearoa and it is not unrealistic that for these parents at that time and in responding to a risk in which they, or at least one party, believed to be promoting the children's safety, settled on a 12-month plan. That said, I am in no doubt the applicant was genuinely motivated but equally focused on her wish to relocate the children to [location A]. And, for the children, settling in [location A] was not straightforward. The parties' evidence expresses some of the grief for them in leaving their father at the end of contact visits. Both children have expressed a wish over time that they spend more time with the respondent. It seems likely [Madeleine], who shares interests with her father, keenly felt the loss of his care time and I accept that for the applicant she made sense of the children's confusion or distress by firmly believing that she had struck the right course for the children both now and for their future.

[42] I accept the overall evidence of the parties reflects the period following the children's relocation was confusing for them and it came with travel complications in spending time with the respondent. It also came at a significant financial cost to the applicant and that financial cost continues on for the parties through the burden of legal fees.

[43] The act of a unilateral relocation of a child or children to another city, and one that is at considerable distance with a drastic impact on the frequency of contact and care, produces an outcome of loss to the other parent. There is grief and there is tension which plays out in legal proceedings. The parties have each held their ground. The parties are proud and committed parents. I am left in no doubt there was for them no common ground and the applicant has protested the strength of her personal reasons behind the move, the strength of her value systems and what she perceives to be the benefits to the children now and long term.

[44] The respondent's evidence was moving. He has grieved the loss of his children, his daughters, from [location B] and, as he has put it, has fought for his relationship and enduring strength of relationship with [Madeleine] and [Grace].

[45] Relocation cases are sad and complex. Sometimes there must be a way forward with for one parent and no going back, but invariably this comes at a loss and the truth is, and I say this in the face of the applicant's strength of conviction or mistrust of the respondent, these parties are both good parents. They love their children unconditionally and their evidence reflects they only want what is best for them. The parties now lead separate lives and now the applicant wants a different world but both want to preserve the strength of their relationship with the children and both want to effectively parent the children.

[46] Although the reasons are disputed, the evidence is clear. There were extended periods the applicant did not make the children readily available to the respondent for contact, either physical contact or indirect contact through Skype or FaceTime calls. Inevitably the children must have become aware of the tension between their parents over their care arrangements both as to contact and long term.

[47] Having the benefit of meeting [Madeleine] and [Grace] I tend to believe [Madeleine] struggled to talk with her father about her views, was protective as to his feelings but also wanting to ensure the strength of their loving father and daughter relationship. I do not think there was any underlying problem that made it difficult for [Madeleine] to talk openly with the respondent or his partner.

[48] There is criticism by the respondent the applicant acted unilaterally in relation to her choice of the children's schooling in [location A] but I accept the applicant's evidence within their relationship and post-separation she took a lead role in making decisions over the children's schooling. It had fallen to her in the past and then the respondent had been accepting of those choices, indeed supportive of those choices, accepting they were best for [Madeleine] and [Grace]. And in the respondent's evidence he talked about changes in [Madeleine]'s early schooling with some different schools over four years before the children relocated to [location A].

[49] A challenging aspect of this hearing has been how late in the piece [Madeleine]'s and [Grace]'s views have become known to the respondent. The parties only learned of the children's views on the morning at the outset of hearing and it is not a case that over the course of these proceedings the children have clearly expressed a consistent view about wanting to remain in [location A]. The respondent's evidence was last year, when talking with [Madeleine] about her views and whether she wanted to remain in [location A] or return to [location B] and acknowledging the fatigue of Family Court proceedings, he understood from [Madeleine], or as she put it: *"To fight for them Daddy"*.

[50] And the respondent's case is in the period or the run up to fixture the applicant has thwarted his contact with ongoing disruptions particularly as it related to indirect contact between himself and the children as Court-directed three times a week. Moreover he points to the applicant's enrolment of [Madeleine] in touch rugby and her training falls on a Friday night which means a clash with travel to see the respondent for his contact weekend but also the heartbreak for [Madeleine] of missing out on practice with her team mates. These proceedings have been difficult. They have been long. They have come at a cost.

[51] The respondent has been under emotional and financial pressure as to what to do or do best for the children long term. He readily concedes the children have become settled over time and points to mid-2022 when he observed [Madeleine] as becoming more confident in her school environment, being more confident in her new community. [Madeleine] had made friends and was becoming more familiar with her Te Reo Māori. The respondent identifies/accepts that [Grace] has flourished, nestled within the [name of school deleted] learning.

[52] The applicant struggles with the financial cost, the burden of transport and the unrelenting pressure of court-directed contact between [location A] and [location B]. It has been frequent and it has taken a toll. The applicant's evidence is she has tried her best but acknowledges somehow she needs to do better. It was difficult to understand her struggle with the misfiring over the children's telephone contact with the respondent. It was difficult to understand some of the issues over better managing how to facilitate the children's ongoing contact with their father given the significance of their relationship with the respondent, given the tyranny of distance, and yet the respondent can readily acknowledge the applicant's wonderful mothering of the children, her parenting talent, the strength she has in taking on the leadership role of their tamariki and her personal knowledge and prowess of Te Reo Māori, her exploration of tikanga and the world of Te Reo Māori and at firmly establishing this as the fabric of the children's day-to-day world.

[53] The applicant now teaches at a [name of school deleted] and deposes as to the strength of her commitment to the children to accessing what is their right in terms of knowledge, their whakapapa, her whāngai whānau in the [location A] area. I was left in no doubt from the applicant's evidence that she perceives the tamariki are safely cradled in her care and those who love her are wrapped around them. The applicant's evidence resonated that she has expelled the respondent from her social world but, in turn, this has impacted on the tamariki's family world and their relationship with their dad. She may not have intended to marginalise the respondent's relationship but it has proven to be a consequence of her unilaterally retaining the children in [location A].

[54] The applicant's case is that if the children were directed to return to [location B] she would not return with them. She relies on her concern that this would be

entirely contrary to the children's parenting experience and that if they were to be placed in the respondent's day-to-day care they would be distressed and simply not cope emotionally with a reversal in care. Moreover, the applicant's case is the respondent is not well resourced to cope with the children's primary care and he needs to continue to work full-time.

[55] I accept that this is not an empty ultimatum thrown down by the applicant but rather her decision reflects her total commitment to her safety and her steadfast belief that the children's emotional wellbeing and their safe passage through childhood is best centred in her day-to-day care.

[56] I prefer not to see this as a contest between the parties as to their strength or commitment to their culture, rather I see the parties' evidence to reflect they both want what is best for their tamariki. They both want their tamariki to be safe, secure, flourish and to be the best version of themselves.

[57] Although the applicant is critical of the respondent and whether he poses a risk to the children there is no doubting the strength of his commitment to them and he equally identifies that he is focused on [Madeleine] and [Grace] to be safe and secure.

[58] The applicant set out with a plan to relocate [Madeleine] and [Grace]. It was not by accident but by design. I accept her decision to settle in [location A] though was something of a calling and I accept the strength of her evidence that she needed to find a place of calm and personal growth (which she is achieving) and to heal. It was compelling. And her evidence highlighted the inherent benefits to [Madeleine] and [Grace] that as they grow in their knowledge of tikanga and Te Reo Māori they are strengthened and enriched by the fabric of their life in living Te Reo Māori, and the respondent accepts the applicant strives to support their tamariki to achieve their best version of themselves. The respondent acknowledged with pride of observing the children's personal growth and their connectedness to their cultural identity and the respondent acknowledges that it is the applicant who has driven this path, who has cut this path for the children.

[59] Although the children's move to [location A] was engineered by the applicant I accept her motivation was genuine. However, and it is a complicating factor of the unilateral relocation to [location A] that on relocating she has not always acted in such a way to facilitate the respondent's contact with the children and in doing so has not valued or acknowledged or appreciated the need for the strengthening of the relationship between [Madeleine] and [Grace] with the respondent. I can only hope that with resolution of the proceedings it opens the way for a new chapter. There is more to be done.

The application for admonishment

[60] Section 68(1)(a) of the Act provides that the Court may, if satisfied that another party to an order has contravened it, admonish the party who has erred by contravention of the order.

[61] Section 71(1) of the Act provides for the Court to award costs, that the Court may order a party to reimburse the other if the Court is satisfied the party contravening the order had no reasonable excuse for doing so and it caused costs to be incurred.

[62] The wider evidence reflects ongoing difficulties for the respondent being able to maintain his regular contact with the girls. In late 2022 the respondent applied for admonishment and explained he interpreted problems with his contact amounted to the applicant's disregard for the order and that this was adversely impacting on his relationship with the girls.

[63] In the decision of Her Honour Judge McKenzie she considered the principles enunciated by Judge Adams in *JRR v SMN* is helpful and the courts exercise of discretion in respect of an application for an admonishment, the relevant factors identified being:[10]

(a) Ranking the breach as to whether it truly warranted admonishment.

[10] *RTM v TAJ* [2010] NZFLR 833. (Final parenting orders)
[10] *JRR v SMN* Family Court Manukau, FAM-2005-057-000366.

(b) The efficacy or otherwise of acknowledgement in the circumstances; and

(c) Whether it serves to be in the best interests of the child or children.

[64] Judge McKenzie made the observation:

> In and of themselves each breach may not be serious, however, it is the cumulative effect of the contraventions which is troubling from the Court's perspective. And it was not for one party to either substitute their view or assert or influence their view as to what was best or preferred as to the children's welfare and best interests.

[65] Judge Greig's September 2022 order provided for contact with the children every second fifth, and eighth weekend of each school term. The order specified: *"Departure time at 3 pm both on the Friday and Sunday"*. The order included video contact each Thursday, Friday, Sunday at 5.30 pm. The order also provided for mid-term school holidays in favour of the respondent and for three weeks of summer holidays with both the applicant and respondent. There were other conditions attached to the order.

[66] The alleged breaches pertained to visits on 18 November 2022 (both of which were departures from the children's confirmed care arrangements) and the children's contact visit scheduled for 9 December 2022:

(a) 18 November 2022 - The applicant explained she was unwell and suggested contact occur the following weekend. The respondent agreed to the change in weekend but was concerned when later he realised that although the applicant had claimed to suffer ill health she and the children continued to enjoy a busy weekend in [location A].

(b) With regards to the weekend of 9 December [Madeleine] had previously asked to vary/change the contact weekend to a later date, or at least the communication was made via [Madeleine]'s device. The respondent declined given he had work commitments. Subsequently the applicant and the children are said to have left [location A] heading

> for [location B] but then advised she had car trouble and as a result could not make the journey.

[67] For the respondent he identifies that a key passage of time in the life of these proceedings and for the children in particular is that over late 2022 they settled. The respondent attributes this shift and the children's sense of comfort and perhaps preference at remaining living in [location A] to the disruption by the applicant to his contact and care over late 2022.

[68] The parties' evidence indicates a shared a sense of anxiety about the other complaining to the authorities (police) or the Family Court about conduct or breaches of either a parenting or protection order. The evidence of both gives voice to a frustration about judgement by the other or how an alleged breach might intercept with the children's care or, for the respondent, a loss of liberty.

[69] The applicant's evidence as to how she cannot keep to the contact order may carry weight in her mind but, stepping back, what was occurring immediately for the applicant and the children seems to have favoured what she wanted to achieve. Although she claimed to being unwell she was well enough to achieve a busy weekend in [location A]. Equally, the fact [Madeleine], or the applicant using [Madeleine]'s device, sought a change in the December contact date. This was followed by a disruption due to the alleged car problems.

[70] I have sympathy for the cost implications of the transport which have fallen to the applicant and also the cost of maintaining a vehicle to undertake such regular and long journeys and the applicant's evidence rings loudly with her indignation that this cost has fallen to her. The Court's decision tends to reflect that this cost has fallen to her as a result of her decision to unilaterally retain the children.

[71] On the weekends that the respondent complains amount to a breach of the parenting order and reflect either a non-compliance or an entitlement on the part of the applicant to substitute her view as to what is in the child's welfare and best interests in the face of the Judge who had made the parenting order, the cost of travel was not

the reason advanced for non-compliance.[11] And the wider picture again is that the applicant has consistently failed to prioritise the respondent's video calls - 5.30 three times a week video calls. The evidential picture of a busy household with after school activities or attendance falls secondary to a tendency by the applicant simply to forget or prioritise or manage this issue and yet it is with such regular occurrence that it defies belief that this is not adhered to but, more than that, this is an important date and time in the children's calendar to sustain, preserve and nurture their relationship with their dad. It is such a relatively straightforward process to make a call. And the respondent's concern, despite having achieved a Court order that preserved this contact, seemed only to highlight for the applicant at least now that the respondent was out of sight, he was certainly out of mind.

Conclusion

[72] The respondent's heartfelt wish to offer primary care or a meaningful shared care was cut short by the applicant's decision to unilaterally relocate the children but these children are now settled. They have put down roots in a new town. They have formed friendships. The tyranny of distance has been more than just the practical implications of transport, but it has also reflected the state of conflict between the parties over the children's future care and, sadly, and I ask the parties heed this, it has placed your tamariki in an impossible situation. As I interpret the parties' evidence, but also the views of the children, it seems to me they have been caught up in the tug of love. It can never now be known what their views would have been had they remained in [location B], whether they would have wanted to relocate to [location A], because the fact is they have now gone and with time and care and secure in the knowledge their father loves them, [Madeleine] and [Grace] have settled and their day-to-day experiences in [location A] have become more relevant and it has come to frame their future. They have adjusted to the respondent being at a distance from them but he is also never far away. There was a strength of the children's korero about knowing and understanding their father was there for them despite the distance.

[73] If I were to direct the children's return to [location B] the applicant's evidence is she shall not relocate and nor do I believe they are empty words. And meanwhile

[11] *RTM v TAJ* [2010] NZFLR 833. (Judge McKenzie)

and relevant to my decision is the tamariki have not experienced their father's primary care. There is evidence to support the conclusion that they would cope with what effectively would amount to a reversal of care and with it all the changes that flow if they were directed to be moved from [location A] back to [location B].

[74] I do not believe it is in the children's best interests that I direct their return to [location B] and to a new care arrangement. I call upon the applicant to find a way forward to support the tamariki and their relationship with their father and to find a generosity of spirit about their father's ongoing contact and care. It will be expensive. It will come at a cost. It will be hard but it must be endured. I accept the parties will both need time to reflect and recover from the impact of these Family Court proceedings and the decision of the Court.

[75] I make the following directions:

(a) In respect of the application for an admonishment I accept the grounds have been made out and that there is a place for a formal admonishment for the applicant's failure to comply with the September 2022 Court order.

(b) I make a final parenting order that the children remain in their mother's day-to-day care; and

(c) I direct the children shall spend weekend contact with their father in [location B]; and

(d) The applicant shall continue to meet the transport and cost of the term time contact. However, I invite counsel for the parties to make submissions as to the benefits, as they see it, of whether the respondent's contact fall once a month on the months that the children are not enjoying a mid-term break or Father's contact continues to fall in line with long weekends such as Waitangi, King's Birthday, Labour weekend, anniversary weekend or Matariki. I shall make those directions in Chambers but what I can signal is I do not think the

children can cope long-term with the frequency of contact here in [location B] as it stands. It will need to be adjusted and, sadly, long-term that will mean a reduction in the term weekend contact time.

(e) However, at mid-term holidays the children shall be in the respondent's care from Friday after school until Wednesday in the second week.

(f) The responsibility for transport for those holidays again falls to the applicant unless the respondent elected otherwise and wanted to incorporate time in [location A] as part of the mid-term holiday.

(g) Going forward the Christmas holiday shall be shared on the basis of three weeks in the care of the parties commencing from the Saturday after school finishes.

(h) In 2023, however, the children shall spend the first three weeks of the holidays, including Christmas, in the respondent's care. Thereafter, the respondent shall continue to have the care of the children on uneven years and the applicant shall have the children on the first three weeks of the school holidays, including Christmas, on the even years. And I acknowledge I am making this change which is out of step with previous years because the respondent and his partner are due to have a baby later this year and this is significant for the children. I direct the children shall spend this coming Christmas with the respondent, his partner and the pēpi.

(i) Going forward the respondent shall collect the children from [location A] at the commencement of his summer holiday care. The time for that pickup to be confirmed by the parties and I will invite counsel to comment on that.

(j) I direct that the applicant, when dropping the children to the respondent's home for the weekend term visit or the start of the mid-term visit, shall do so directly to his home. I do not accept it is in

the children's interests after a long trip late at night to transition between parents at a garage or a 24-hour convenience store. It sends a message to the children who really just want to get inside and go to bed.

(k) Video phone contact each Tuesday, Friday and Sunday at 7 pm or on three days of the week and at a time agreed between the parties. The respondent to facilitate on [Madeleine]'s mobile phone.

Conditions:

(l) Neither parent (or partner) shall be under the influence of alcohol or any illicit substance or non-prescribed drug while caring for the children.

(m) If the paternal grandfather has contact it must be day-time and supervised by the respondent.

(n) Contact between the parties relating to the children's contact and care shall not be a breach of the protection order.

(o) When the parties communicate it must be respectful and child-focused.

(p) Additionally, I confirm that this weekend the children will be in their father's care until 1 pm and I invite the respondent to tell the children about the decision of the Court. I believe it is appropriate he has the opportunity to tell them himself.

(q) I have made an order for admonishment. I accept that the applicant failed to properly adhere to the terms of Judge Greig's parenting order in respect of the respondent's contact over late 2022. I harbour the concern that perhaps the applicant's intention was to promote what she considered best for the children and it was not just a level of disrespect for the terms of the Court order but it also perhaps bedded down the children's experiences in [location A].

(r) The prospect of the children's return to [location B] must have become more remote to them over time but I have been, throughout the evidence, concerned about the applicant's somewhat casual disregard to the terms of the Court order and the importance of that care and contact time for the respondent, the applicant's evidence being that she has been the victim of circumstance but that simply does not ring true.

(s) In respect of the application for admonishment, I direct counsel to file submissions as to costs within 21 days.

(t) I am mindful of the imposition of the applicant's budget and whether a cost of orders are in the children's best interests and so more time and information is required for me before I make a decision.

(u) In making my direction it should not signal that costs shall issue but rather the issue needs to be properly considered.

(v) I also confirm that the Easter break and school holidays, of course, falls soon.

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Judge S M R Lindsay
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 13/04/2023