

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

**NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY
REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND
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IN THE FAMILY COURT

I TE KŌTI WHĀNAU

**FAM-2019-087-000162
[2021] NZFC 10554**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[MALLORY DRAKE] Applicant
AND	[DEREK DRAKE] Respondent

Hearing: 21 October 2021

Appearances: Ms E Butler for the Applicant
Ms Manning for the Respondent
Ms S Hurley as Lawyer for Child

Judgment: 22 October 2021

**DECISION OF JUDGE D G SMITH
[Determination as to safety]**

[1] This matter was set down as a safety hearing to determine what kind of contact [Jethro Drake] , aged [six years], should have with his father.

[2] The current parenting order as to contact has not been followed since [Jethro] made disclosure to his mother that his father had strangled him.

[3] The disclosure was made on 31 January 2021 following [Jethro]’s last visit in his father’s care. The disclosure was reported to the police and an evidential video interview was conducted on 16 February 2021.

[4] During the evidential interview it is accepted by the police and all counsel that [Jethro] stated:

- (a) “My dad squeezed my neck and I couldn’t breathe for a little while”.
- (b) “It hurted and I cried after and he slammed the door just after”.
- (c) “This was the first time (it happened)”.
- (d) “He got angry and squeezed my neck on the bed ‘cos he wanted to be by himself and do his work”.

[5] The police considered that as there were no witnesses to the alleged assault or injuries sustained by [Jethro], they did not believe it met the evidential threshold for further police action.

[6] Ms [Drake]’s evidence was that she sent a text to Mr [Drake] putting to him that he had strangled [Jethro]. His reply was on 6 February 2021. Ms [Drake] says this was two days after she had sent her text. Mr [Drake]’s reply was by way of email and a copy of that was produced to the Court. Two days later, having received that email, Ms [Drake] reported the matter to the police.

[7] In her affidavit of 1 April 2021, Ms [Drake] states:

[Jethro] spontaneously disclosed to me (on 31st January 2021) that [Derek] had strangled him.

[Jethro] stated this occurred towards the end of his stay with [Derek] (Jan 12th - 26th).

The event was triggered by [Jethro] talking about me, his mum, which made [Derek] very angry.

[Derek] in his rage put both his hands around [Jethro]’s neck and squeezed tight so that [Jethro] could not breathe.

[Jethro] tried to tell his father to stop, but could not breathe, so could not talk. [Derek] then let go, stormed out of the room and slammed the door behind him with [Jethro] frightened and in tears.

[8] Mr [Drake] in his affidavit on 15 June 2021 states:

I believe any comment [Jethro] may have made relates to an incident that happened when [Jethro] was staying with me in January 2021 and he wanted to go to Kmart and I refused. He started punching and kicking me. I held him to stop him. He was surprised by this. I decided to leave the room. I was away for less than a minute and came back to the room. We sat down at [sic] [Jethro] told me that I had made him upset. The police did contact me to do an interview but refused to tell me what it was about. My lawyer was very clear that I should not do an interview with the police. I followed that legal advice.

[9] I have viewed the evidential interview. It took place about three weeks after the alleged incident. [Jethro] was not overly upset in talking about the incident, although obviously he refers to having cried, that it hurt, and his father was angry.

[10] Given [Jethro]'s presentation in the evidential interview, it is easy to understand the police's decision not to proceed with criminal proceedings given any charge needed to be proved beyond reasonable doubt. The standard of proof in this Court though, is to the balance of probabilities, i.e. is it more probable than not the event occurred.

[11] Ms [Drake] made much of the fact that it took Mr [Drake] two days to respond to her text. I note it took her four days to send a text to Mr [Drake].

[12] During cross-examination it was brought out that [Jethro] has been known to embroider stories. That has been commented on by his schoolteachers and others. Be that as it may, I was left with the impression that [Jethro] was trying to tell the truth in the interview as to what occurred.

[13] That [Jethro] was trying to tell the truth, however, does not mean that what he said was what happened. All witnesses, whether they be a child or an adult, can have their recollections clouded by their emotions arising from an incident. Our memories are not video recordings and may often have incorrect details.

[14] 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.

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

[16] 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].

[17] [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.

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

[19] It is concerning to me Mr [Drake] was prepared to refuse to have contact with [Jethro] on a supervised basis because he saw it as a matter of control being imposed by Ms [Drake]. Whether that was the case or not, [Jethro]'s contact with his father should have been to the forefront of his mind. It took him some considerable time to agree to supervised contact. The person who suffered the most from that is [Jethro].

[20] There have been allegations of alienation. This proceeding comes nowhere near an alienation case. That term is used far too readily. But if the parents continue to behave in the way in which they both have, then they will force [Jethro] to take sides. That must not happen.

[21] Counsel are to confer as to what is available in the [region deleted] to assist Mr [Drake] with anger management in child related circumstances. In other words, he needs to learn better parenting skills.

[22] Both parties are directed to communication counselling. Lawyer for child is to confer and advise what directions are required to affect that being put in place. Having the parents on opposite sides of the island may cause some difficulty.

[23] Contact should commence again but not as set out in the current order. The current order as to contact is suspended while the relationship between [Jethro] and his father is re-established and normalised.

[24] Counsel are to confer on a timetable for contact which begins with a short visit during the day, moving to consecutive day contact then to overnight visits before returning to the current order.

[25] I do not expect contact to be formally supervised, but it should be monitored while the parenting course is being completed.

[26] Lawyer for child is asked to draft a variation of the current order which meets the above directions for my approval.

[27] I am conscious the Christmas holidays are fast approaching so arrangements need to be made promptly.

Judge D G Smith
Family Court Judge

Date of authentication: 22/10/2021

In an electronic form, authenticated pursuant to Rule 206A Family Court Rules 2002.