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

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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2015-090-000746
[2020] NZFC 596

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[SCOTT] Applicant
AND	[CARTER] Respondent

Hearing: 20, 21 January 2020

Appearances: A Brown for the Applicant
J W Howell and D Wilsher for the Respondent
R Adams as Lawyer for the Child

Judgment: 14 February 2020

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO DAY-TO-DAY CARE AND CONTACT]

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[1] [Aaron Scott] was born on [date deleted] 2015; he is aged [four years old]. [Aaron] has never really seen his mother and father talk,[1] and he has rarely seen them together; for all of his cognitive life he has been embroiled in the conflict between them. Since his birth he has been in the care of his mother, Mrs [Carter].[2] His father, Mr [Scott], is now applying for the day-to-day care of [Aaron] on the basis of Mr [Scott]'s belief that Mrs [Carter] has consistently undermined his role as [Aaron]'s father, and that she is seeking to exclude, as far as practicable, Mr [Scott] from [Aaron]'s life. Mrs [Carter] accepted by the end of her evidence that her attitude towards Mr [Scott] could be better but maintains she has now had a significant change of attitude, and that she will be supportive of Mr [Scott]'s relationship with [Aaron] in the future. On that basis she seeks that [Aaron] remain in her care but seeks to reduce [Aaron]'s future contact with Mr [Scott]. I need to determine, therefore, with which parent [Aaron] is to live in the future, and what contact he is to have with the other parent.

A Brief History of the Court Proceedings

[2] Mr [Scott] filed his first application when [Aaron] was not even three months old, following the unilateral relocation of [Aaron] from [location A] to [location B] by Mrs [Carter]. Mrs [Carter] responded by ceasing all contact between [Aaron] and Mr [Scott]. Contact only resumed in April 2016 when an Interim Parenting Order was made by his Honour Judge Druce providing for Mr [Scott] to have contact with [Aaron] every second weekend on a Saturday and Sunday morning. At a subsequent hearing on 6 July 2016 his Honour Judge Maude recorded Mr [Scott] was already concerned regarding "a developing risk of alienation of [Aaron] from him".[3]

[3] What is apparent from Judge Maude's decision is that the interim contact arrangements set out by Judge Druce rapidly broke down because Mrs [Carter] and her parents believed that the Interim Parenting Order required Mr [Scott] to have supervised contact. Therefore, when they saw Mr [Scott] returning from taking [Aaron] for a walk in a pushchair with no other adult present, they believed he had

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1 Notes of Evidence, p 79, line 21-25.

2 Ms [Carter] has remarried, and during her evidence she confirmed that she wishes to be known as Mrs [Carter]. I accordingly refer to Ms [Carter] as Mrs [Carter] in this judgment.

3 *[Scott] v [Carter]* [2016] NZFC 5728 at [10].

breached the terms of the order. For the reasons set out by Judge Maude at [12] and [13] there was never any requirement by Judge Druce that Mr [Scott] required supervision, and his Honour found that Mrs [Carter]'s and Mrs [Smith]'s (Mrs [Carter]'s mother) position over Mr [Scott] taking [Aaron] for a walk in a pushchair was "unacceptable and unjustified."[4] Judge Maude increased Mr [Scott]'s contact to weekly contact on a Saturday and Sunday for three hours per visit. Those orders were made on 6 July 2016 and on 29 July 2016 Mr [Scott] was forced to apply for a warrant as [Aaron] had not been made available for his contact. Judge Maude varied the interim order but noted "any further failure to enable contact to occur will result in the issue of a warrant".

[4] The proceedings were transferred from the Waitakere Family Court to the Tauranga Family Court and set down for a four day hearing before her Honour Judge Parsons commencing on 31 October 2017. On the first day of the hearing the issues were resolved by consent. Her Honour recorded:[5]

> Sadly, what is reflected and what is filed is a history since just after [Aaron]'s birth, with both the parties absolute lack of trust of each other. That dynamic has sadly been reflected in the support from each of the parties' respective families.
>
> While it is impressive and helpful to have wider family support for children at times of break-up, sadly in this case it has seen a complete polarization of the parties.

[5] The agreed Parenting Order provided for Mr [Scott] to have contact with [Aaron] fortnightly from Friday, 12.00 noon until Monday at 3.00 pm. There were specific conditions attached to the order in relation to changeovers, including for the return on the Monday to thereafter be at [changeover location deleted] at [location B]. The order also provided for Christmas and holiday contact, and overseas travel.

[6] Contact then proceeded in terms of that order, but on 16 November 2018 Mrs [Carter] applied without notice for an order suspending Mr [Scott]'s contact with [Aaron] because of concerns that [Aaron] had suffered burns while in his care. On a without notice basis an order was made requiring Mr [Scott] to have supervised

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4 *[Scott] v [Carter]* [2016] NZFC at [23].

5 *[Scott] v [Carter]* [2017] NZFC 8797 at [4] and [5].

contact with [Aaron]. That supervised contact eventually occurred at [supervision agency deleted] but prior to that there was a period in which Mr [Scott] simply had no contact because of the inability of he and Mrs [Carter] to agree on an appropriate supervisor. The hearing to consider the allegations of burns and future contact between Mr [Scott] and [Aaron] was heard before his Honour Judge Geoghegan on 17 April 2019. His Honour found at [21] that:[6]

> I consider that [Mrs Carter] is simply determined without any proper basis at all, that Mr [Scott] has exposed [Aaron] to danger and that that has been unacceptable and [Mrs Carter] has not been prepared to countenance any other explanation.

[7] His Honour went on to find that Mrs [Carter] had failed to disclose the existence and her awareness of a number of text messages which were directly relevant,[7] and if they had been disclosed, may have resulted in the Court declining to make an order without notice to Mr [Scott]. His Honour held there were no safety concerns for [Aaron] in the care of Mr [Scott] and discharged the Interim Parenting Order requiring supervised contact. His Honour further directed that contact revert to that set out in the Consent Order made by Judge Parsons.

[8] However, on 4 February 2019 Mr [Scott] filed an application to vary the Parenting Order made before Judge Parsons on the basis that there will still problems with his contact with [Aaron]. It is that application that I need to determine.

[9] Mr [Scott]'s application was set down on an earlier date for a formal proof hearing before me. As Mrs [Carter] had not complied with earlier directions of Judges Geoghegan and Cook to file a Notice of Response, Judge Cook debarred Mrs [Carter] from any further participation in the proceedings. As I recorded in my judgment of 10 September 2019,[8] almost literally at the Court door Mrs [Carter] filed an affidavit and sought leave to do so.

[10] I went on to record:

> What is clear is that there remains an extremely high level of conflict between these parents. That can be seen through what objectively is quite a simple

[6] *[Scott] v [Carter]* [2019] NZFC 2958.
[7] At [23] and [24].
[8] *[Scott] v [Carter]* [2019] NZFC 7371.

> issue; that is the current order provides for a changeover to occur at [the changeover location] in [location B]. [Mrs Carter] has shifted to live in [location C],[9] but has insisted that the changeover occur in [location B] on an ongoing basis necessitating what Ms Adams estimates is an hour and a half additional travel time for [Aaron]. That can only be categorised as an absurd requirement given that Mr [Scott] travels from [location A] and would be driving past [location C] on his way to [location B].[10]

[11] Mrs [Carter]'s then counsel suggested that that was an issue which could be the subject of discussion in the following days. I responded that I expected an agreement to be reached on the issue on that day. Agreement was reached, with the order being amended to change the drop-off venue from [the changeover location] in [location B] to [a kindergarten] in [location D]. What became apparent from the evidence in this hearing was that unbeknownst to Mr [Scott], Mrs [Carter] had been requiring him to go to [the changeover location] in [location B] for around 12 months after she had shifted to [location D]. It is against that background that the matter came before me for determination as to the day-to-day care arrangements in relation to [Aaron].

The Relevant Legal Considerations

[12] The Court's first and paramount consideration has to be the welfare and best interests of [Aaron] pursuant to s 4 Care of Children Act 2004. Pursuant to subs (2) it needs to be an individualised assessment, and as Priestley J held in *Brown v Argyll* there can be no formulaic approach by the Court.[11] Section 4(2)(a)(ii) requires the Court to consider the relevant s 5 principles. The Supreme Court in *Kacem v Bashir* has held that I need to identify not only the s 5 principles that are relevant but also those that are irrelevant and why.[12] Further, in *Kacem v Bashir* the Supreme Court has held that apart from s 5(a) (the protection of [Aaron]'s safety and from all forms of violence), there is no internal weighting as between the remaining principles. Pursuant to s 4(2)(b) I cannot take into account the conduct of either of [Aaron]'s parents unless that conduct is directly relevant to the issue of [Aaron]'s best interests and welfare. Pursuant to s 6 of the Act, [Aaron] is to be afforded an opportunity to express his

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[9] It subsequently has transpired that in fact Mrs [Carter] lives in [location D], not [location C].
[10] Note 8, at [4].
[11] *Brown v Argyll* (2006) 25 FRNZ 383.
[12] *K v B* [2011] 2 NZLR 1; [2010] NZFLR 884; (2010) 28 FRNZ 483 (SCNZ).

views. However, [Aaron]'s views will be weighed against his age and maturity as a [four year old], as set out by the High Court in *C v S*.[13]

[13] Thus, the Court's role is to consider the relevant s 5 principles and weigh those principles as I see fit on the particular facts of this case, consider the totality of the evidence before the Court and weigh that evidence as I see fit, and only then reach a determination as to the outcome which best serves the welfare and best interests of [Aaron].

[14] On the facts of this case, I determine that s 5(f) is irrelevant. There is no particular evidence or facts before the Court which require a consideration of [Aaron]'s identity in terms of s 5(f). The remaining principles in ss 5(a) to (e) inclusive are all relevant on the facts of this case.

The Views of [Aaron]

[15] Section 6 requires an opportunity for [Aaron] to express views on the matters before the Court. The importance of this section has been recently reaffirmed by the High Court in *GF v EF*.[14] Fitzgerald J reaffirmed that s 6 requires even a pre-school child to be given reasonable opportunities to express views, thereby requiring a child to be given opportunities to express his or her views on the central matters in issue in the case. Her Honour referenced similar decisions of the High Court in *C v S*[15] and *Carpenter v Armstrong*,[16] noting that in *C v S* the child concerned was 4 years old.

[16] [Aaron] has been more than ably represented by Ms Adams throughout these proceedings. However, as set out in her reports she did not, given his age, directly obtain [Aaron]'s views in relation to the issues before the Court. As Ms Adams is a senior and highly experienced lawyer for child (in whom the Court has full confidence) I would have been prepared to accept her judgment in relation to not directly seeking [Aaron]'s views, especially given his age and the fact he is already enmeshed in, and adversely affected by, his parent's conflict. However, in light of the recent High Court

13 *C v S* [2008] NZFLR 715.
14 *GF v EF* [2019] NZHC 3140.
15 See note 13.
16 *Carpenter v Armstrong*, HC Tauranga, CIV-2009-470-511, 31 July 2009.

decision *GF v EF*, perhaps she should have done so. I deliberately use the phrase "perhaps" as given the High Court's reaffirmation that even pre-school children, including those in a high conflict parenting dispute, must be given opportunities to express their views on the ultimate issues, there will need to be a debate around how that can best occur and whether it should be through lawyer for the child or not.[17] Ms Adam's focus, as is appropriate, has been focused upon the factors impacting [Aaron]'s best interests and welfare. As Fitzgerald J noted, given [Aaron]'s age, there is an issue as to weight to be attached to any views if expressed,[18] and applying *C v* S, any views expressed by [Aaron] may not be determinative on the outcome.

[17] In this case, [Aaron] has also met with the s 133 report writer, Mr Irving. In his report of 24 July 2019, Mr Irving sets out the views of [Aaron] and the factors impacting on his welfare and best interests as required by the brief sent by the Court. Specifically, [Aaron]'s views about "how many sleeps' he would like at his father's house, and what he likes and dislikes about both homes, were set out at [58] to [66] of his s 133 report.[19] I acknowledge that Mr Irving did not directly ask [Aaron] where he would want to live, and nor should he have asked such a question. For I suggest that the literature shows that it is rarely appropriate to ask such a direct question of children, and especially of young children. As Fitzgerald J stated, how the ultimate issue is framed to children must be tailored to each individual child.[20] I consider that [Aaron] has expressed his views to Mr Irving and that those views are that he would like one night only in the care of his father. I place no weight on those views given [Aaron]'s age, his immaturity, and the apparent inconsistencies in his comments to Mr Irving as to whether he did or did not want to see his father, and whether he did or did not enjoy his contact with his father.

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17 Perhaps the answer lies in the increased use of s 133 reports, with a very narrow brief, but this is likely be in conflict with the mandatory requirements of s 133(6) COCA which limits the Court's ability to get such reports, and in some areas of the country where it can take over 12 months to obtain a s 133 report, the issue of delay will become prohibitive in terms of s 133(6)(d). Furthermore, such a report will be precluded pursuant to s 133(6)(e) if it is to solely seek children's views.

18 *GF v EF* at [34].

19 Bundle of Documents, p 142-143.

20 *GF v EF* at [33].

Section 5 Principles

[18] Section 5(a) requires [Aaron]'s safety to be protected, and in particular for him to be protected from all forms of violence.[21] As Ms Brown sets out in her closing submissions, Mr [Scott] position is that Ms [Carter] has engaged in psychological abuse of [Aaron] by exposing him to negative views while in her household or while in the care of his extended maternal family. Alternatively, it is her submission that the conflict between [Aaron]'s parents has been exacerbated by the views held by other adults in the household of Mrs [Carter] and her extended family. I accept that ensuring [Aaron]'s safety, must include [Aaron]'s psychological safety. Thus, there is a need to ensure that [Aaron] is protected from the potential for psychological harm which may result from any future orders made by the Court. Consideration of that issue is inextricably interwoven with some of the other s 5 principles.

[19] Sections 5(b) and (c) provide that [Aaron]'s care, development and upbringing is the responsibility of his parents as his guardians, and that that care, development and upbringing should be facilitated by ongoing consultation and co-operation between his parents. There is no dispute in this case that [Aaron] should be in the care of either of his parents. However, as I will set out below, "ongoing consultation and co-operation" between his parents has been non-existent and is potentially no more than an aspirational goal. At [four] years old [Aaron] has barely seen his parents in each other's presence, and when he has it is more often than not been beset by conflict. There is also some force on the facts of this case to support Mr [Scott]'s concerns that Mrs [Carter] excludes him from guardianship decisions; I will set out examples below. On the evidence, it is clear to me that Mr [Scott] is willing to co-operate and communicate with Mrs [Carter], and that if [Aaron] is in his care, that there would be a better likelihood of this occurring than if [Aaron] remains in his mother's care.

[20] Section 5(d) provides for [Aaron] to have continuity in his care, development and upbringing. As Priestley J held in *Brown v Argyll*, that principle is not automatically determinative and there is no presumption in favour of the status quo.[22] In some cases, this principle will be determinative. In this case it is a principle I give

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[21] Violence is given the definition set out in the Family Violence Act 2018.

[22] *Brown v Argyll*; *Clapham v Clapham* [1993] NZFLR 408.

significant weight to, given that [Aaron] has been in the day-to-day care of Mrs [Carter] for all of his life.

[21] Section 5(e) provides for [Aaron] to continue to have a relationship with both of his parents. It also provides that [Aaron]'s relationship with his wider family group should not only be preserved but also be strengthened. The question of whether Mrs [Carter] is able to support [Aaron]'s relationship with Mr [Scott] is an issue in this case. Mr [Scott] contends that since [Aaron]'s birth, Mrs [Carter] has systematically sought to exclude [Aaron] from his life. Mr [Scott]'s mother gave evidence describing her sense that Mrs [Carter] and the maternal family seek to make the paternal family mere spectators in [Aaron]'s life, rather than active participants.

[22] Mrs [Carter] has remarried. Thus, Mr [Carter] (Mrs [Carter]'s husband) is part of [Aaron]'s family group, as is Mr [Carter]'s child from a previous relationship. Mr [Scott] has re-partnered, and his partner, Ms [Greerton] (also part of [Aaron]'s family group), is to shortly give birth to their child; that child will be a half-sibling of [Aaron] and part of [Aaron]'s family. Additionally, Mrs [Carter] works in her parents' business, and while she is working in that business her parents provide support and care of [Aaron]; they are therefore similarly significant people in [Aaron]'s life. Mr and Mrs [Scott], Mr [Scott]'s parents, are also important and significant people in [Aaron]'s life and he has a very close, good relationship with his paternal grandmother in particular. In considering the issues around [Aaron]'s care and factors impacting upon his welfare and best interests, these are all relationships that I need to give significant weight to on the facts of this case.

[23] Essentially, therefore, in considering those principles the issues I need to determine are:

(a) Whether [Aaron] should continue to be in the day-to-day care of Mrs [Carter], and if so, what care/contact arrangements should be put in place to ensure [Aaron]'s ongoing ability to continue his relationship with his family, and to preserve and strengthen other significant relationships in his life.

(b) If I accept Mr [Scott]'s assertion that Mrs [Carter] has systematically sought to exclude him from [Aaron]'s life, whether there should then be a change in [Aaron]'s day-to-day care. Arising out of this is the question is the further issue of whether any risks for [Aaron] in changing his primary day-to-day care outweigh the risks of his ongoing exposure to parental conflict.[23]

[24] Resolution of these issues requires an examination of all of the evidence that is before the Court.

What is the Relevance of the Burns Incident?

[25] [Aaron] returned from a visit with his father with some burns on his arm. Notwithstanding those burns [Aaron] still had the following scheduled weekend contact with his father. However, subsequent to that contact Mrs [Carter] sought and obtained on a without notice basis an Interim Parenting Order pursuant to which Mr [Scott] was to have supervised contact with [Aaron]. Shortly after that order was made Mr [Scott] filed a Notice of Response in which he set out his account of what had occurred. The facts as recorded by Judge Geoghegan[24] were as follows:[25]

> In [Mr Scott's] affidavit he stated that on 7 October he had a barbecue at his home. That barbecue was attended by his parents, his grandparents, his partner, his partner's [child] and [Aaron] who was in his care at the time. He stated that [Aaron] who had been playing on the deck had thrown a synthetic cushion into a brazier which was the source of an open fire. Mr [Scott] went to remove it, [Aaron] went to grab it as well causing sparks to fly up and hit his arm. Upon that occurring, [Aaron]'s arm was immediately put under cold water and aloe vera applied to the burns. [Aaron]'s maternal [in fact should be paternal] grandmother is a [medical professional] and, as I have said, she was present. [Aaron] was administered Pamol and Ms [Scott]'s mother sought advice from a medical colleague and was told broadly to bring [Aaron] into the doctor's clinic if blisters appeared the following day.
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> …
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> Out of an abundance of caution, Mr [Scott] decided to get a medical clearance before [Aaron]'s return and took him to the doctors. The doctor's examination concluded that there was nothing further that needed to be done. Mr [Scott] annexed the doctor's record of examination, dated 9 October 2018. That referred to [Aaron] using his arm freely, to there being no distress, to [Aaron]

23 There being no dispute that [Aaron] has been exposed to parental conflict.
24 And subsequently accepted by his Honour as being accurate.
25 *[Scott] v [Carter]* [2019] NZFC 2958 at [11] and [12].

> having numerous very small superficial burns on his right forearm, but there was no evidence of infection, that there was no sign of any complication and [Aaron] was not in need of dressing or further treatment.

[26] Mrs [Carter] further refused to agree to any of the proposed supervisors suggested by Mr [Scott], instead offering supervisors which she accepted in cross-examination would have been entirely inappropriate people from [Aaron] and Mr [Scott]'s perspective to provide supervision.[26] After some months of trying to resolve the matter Mr [Scott] was only able to have contact at [the supervision agency]. Thus, whilst [Aaron] could have had contact supervised by people with whom he was familiar, because of Mrs [Carter]'s unwillingness to agree to any reasonable request by Mr [Scott], there was a period of six months in which the only contact that Mr [Scott] had with [Aaron] was three supervised visits at [the supervision agency] commencing in late February 2019. Furthermore, Mrs [Carter] added to the Supervised Access Agreement with [the supervision agency] and hand wrote additional restrictions which had the effect of preventing any of Mr [Scott]'s family from attending and prevented Mr [Scott] from giving [Aaron] any presents.[27] Given that his period of non-contact included Christmas, these restrictions were unwarranted and contrary to [Aaron]'s best interests and welfare.

[27] The hearing to consider Mr [Scott]'s ongoing contact and whether Mr [Scott] presented a risk to [Aaron] due to the Burns Incident came before Judge Geoghegan on 17 April 2019. As recorded in his Honour's judgment, Mrs [Carter]'s position was that Mr [Scott] required ongoing supervision. What is clear from Judge Geoghegan's decision was that when confronted with a reasonable explanation, Mrs [Carter] continued to assert that [Aaron] was in danger from Mr [Scott] and that he would need to have ongoing supervised contact. Mr Howell, in his cross-examination of Mr [Scott], implied that as the court had made the order requiring Mr [Scott] to have supervised contact, it was the court's 'fault'.[28] Mr Howell repeated this argument in his written submissions; I reject this argument as what this ignores is the finding by Judge Geoghegan that Mrs [Carter] failed to disclose all material facts to the court at

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26 Notes of Evidence, p 179, lines 7-14; p 177, line 21 to p 178, line 17.
27 Notes of Evidence, p 162, line 26 to p 163 line 22.
28 Notes of Evidence, p 19, lines 12-19.

the time of making her application,[29] and Mrs [Carter]'s unreasonable insistence that there be ongoing supervision.

[28] It is fair to say that Judge Geoghegan was very critical of Mrs [Carter]. At [18] of his judgment he recorded:

> Regrettably, my assessment of [Mrs Carter] having seen and heard her give evidence, is deeply unfavourable. I considered much of her evidence to be disingenuous and reflective of what could only be described as a deep and ingrained antipathy towards Mr [Scott]. I consider that that antipathy is the filter through which all perceptions and observations of [Aaron] and his relationship with his father passes. I consider that antipathy and those perceptions to provide a real and present concern for [Aaron]'s continuing welfare and best interests.

[29] His Honour found that the burns to [Aaron] were simply the result of an unfortunate accident and was "something which occurs in the best of households and under the best of supervision".[30]

[30] I set out those passages from the judgment as they clearly show that Mrs [Carter] seized upon an unfortunate accident, without any reasonable justification, and used that as an excuse to require Mr [Scott] to have supervised contact with [Aaron]. While I accept that Mrs [Carter] may have been well-intentioned at the time she made her application, as recorded by Judge Geoghegan, there was absolutely no justification for her ongoing insistence that Mr [Scott] presented a safety risk to [Aaron] and that his contact needed to be supervised.

[31] The credibility findings of Judge Geoghegan are not binding on me. Rather, I need to make my own assessment of Mrs [Carter]'s evidence solely based upon the evidence that has been given in Court before me. Having approached this hearing with an entirely open mind, I have found myself making the same observations and conclusions of Judge Geoghegan in relation to Mrs [Carter] being disingenuous and her antipathy being so deeply rooted that it colours her ability to focus on what is in [Aaron]'s best interests and welfare. This is a case where the conduct of Mrs [Carter]

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[29] At [24] of his Honour's judgment.

[30] At [19].

is directly relevant[31] and requires careful consideration as it has adversely impacted the welfare and best interests of [Aaron].

Is there a Diagnosis for [Aaron]'s Behavioural Concerns?

[32] Following the burns incident and [Aaron]'s contact with Mr [Scott] ceasing for six months,[32] there was an immediate and significant deterioration in [Aaron]'s behaviours. Mrs [Carter] consequently approached her GP stating that she was struggling to cope with [Aaron]. [Aaron] was, around this time, excluded from his then day-care because of his violence and his oppositional behaviours. A referral was made by Dr [Segal], [Aaron]'s paediatrician, to CAMS. I accept the evidence of Mrs [Carter] that, to her, Dr [Segal] expressed his view that [Aaron] may be exhibiting the signs of being on the autistic spectrum; from that comment a narrative appears to have developed that [Aaron] in fact has autism.

[33] In fact, there had never been any such diagnosis. By consent under s 9 Evidence Act 2006 an email from Ms Adams to counsel of 21 November 2019 was produced. It records a conversation she had with Dr [Segal]. That email records:

> There has been no diagnosis [of autism], and Dr [Segal] says that there is not any presumption or expectation.
>
> Dr [Segal] is a general paediatrician, and not a child behavioural expert. The specialist assessment must be made by the multi-disciplinary assessment team. Dr [Segal]'s role is to initiate and co-ordinate that assessment.
>
> …
>
> There has <u>not</u> been a provisional, let alone a definitive, diagnosis of autistic spectrum disorder or any other psychological or psychiatric condition.

[34] Mr Irving, the s 133 report writer, appears to have adopted the narrative of [Aaron] being diagnosed with autism. He recorded at [92] of his 24 July 2019 report:

> Dr [Segal] is in the process of formulating a diagnosis for [Aaron]. After consulting directly with the paediatrician, sighting clinical assessment results, interviewing the adult parties, interviewing [Aaron] himself, and observing [Aaron] interacting in his two home settings (and is presenting with ADHD and ASD features) the writer can confidently advise the Court that [Aaron]

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31 In terms of s 4(3) of COCA.

32 Acknowledging that there were 3 short supervised visits in February/March.

> will be assessed to having an autism spectrum disorder and thus can be considered a special needs child.

[35] Mr Irving erred in his unequivocal assertion that [Aaron] will be diagnosed with ASD, as it is by no means clear that there will in fact be such a diagnosis. Furthermore, Mr Irving's brief is recorded as being the standard brief together with:

> (a) The psychologist is to consult with the paediatrician who has been directed to make a paediatric assessment so that the psychologist can determine if there are underlying medical, development and behavioural issues for [Aaron] causing him to behave in the manner he is and which may impact on any care arrangements.
>
> (b) And if so, how that may best be managed by the parents.

[36] That brief did not require Mr Irving to make his own diagnosis, but rather to simply enquire of the paediatrician in relation to any assessment undertaken. Given that Ms Adam's email makes it quite clear that there was not at the time of Mr Irving's report, either a provisional or definitive diagnosis of autism spectrum disorder or any other psychological or psychiatric condition, it is hard to see the basis upon which Mr Irving was able to "confidently advise the Court" that [Aaron] would be assessed as having an autism spectrum disorder let alone ADHD and ASD features.

[37] While all counsel accepted that Mr Irving as a suitably qualified expert in terms of his ability to provide reports under s 133 of COCA, there is nothing in the qualifications set out by Mr Irving to indicate that Mr Irving was or is suitably qualified to make his own independent diagnosis of ADHD or ASD.[33] Mr Irving's report contains a series of recommendations for the parents based upon [Aaron] have a definitive diagnosis of ASD, and on the basis that [Aaron] is a special needs child. Indeed, when I read Mr Irving's report it appears much of it does not address the specific matters he was required to address in terms of his brief as set out on page 1 of his report.[34] For example, nowhere in his report does he comment on [Aaron]'s attachment or the issue of alienation or estrangement. I found the majority of his opinions contained in his report and his oral evidence to be of little meaningful or credible assistance to me.

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[33] Consequently, his opinion on this issue is inadmissible pursuant to s 25(3) Evidence Act 2006.

[34] Page 134, Bundle of Documents.

[38] The difficulty, as I perceive it, in Mr Irving accepting (erroneously) or purporting to make a diagnosis of ASD is that he has consequently not undertaken any other assessment or explored any other possible reasons for [Aaron]'s behaviours. Additionally, the criticisms he has of Mr [Scott]'s lack of discipline and his inability to engage [Aaron] in a task in which [Aaron] had no interest do not appear to consider the fact that [Aaron] had at that stage not seen his father for six months and had only become recently reacquainted with him.[35] Consequently, Mr Irving's assessment about the supposed weaknesses in Mr [Scott]'s parenting of [Aaron] are given little weight by me. It is clear on Mr [Scott]'s and Ms [Greerton]'s evidence that as Mr [Scott] has had regular contact with [Aaron], he now feels more able to discipline [Aaron].[36]

[39] It is not disputed that there was a deterioration of [Aaron]'s behaviour following the period in which [Aaron]'s contact with his father all but stopped. This change in behaviour included being violent to other children, having temper tantrums, exhibiting difficulties playing with other children, and a rapid transition from one activity to another. The evidence is that this has only occurred in the home of Mrs [Carter], in the care of his maternal grandparents, or at his day-care. This eventually resulted in the day-care excluding [Aaron].

[40] That evidence should be contrasted with the evidence of Mrs [Scott] Snr, Mr [Scott] and Ms [Greerton]. I accept their evidence that they have seen none of those concerning behaviours when [Aaron] has been in the care of his paternal family, apart from a brief period after [Aaron]'s contact with Mr [Scott] recommenced after the six month break.[37] Ms [Greerton] described in detail [Aaron]'s ability to play constructively with her [child] and with a neighbouring boy.[38] There was no violence, no lashing out at others, destroying other people's toys, tantrums or verbal abuse including swearing.[39] Mrs [Scott] Snr gave extensive evidence about [Aaron]'s relationships with his cousins and other children near her home all of which were entirely positive.[40] She is a [medical professional] with decades of experience and she

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[35] Notes of Evidence, p 46, lines 20 – 26; p 85, line 17 to p 87, line 6.
[36] See for example, Notes of Evidence, p 107, line 17 to p 108, line 12.
[37] Notes of Evidence, p 44, lines 27 – 32; p 45, lines 7-14; p 46, lines 20-26.
[38] Notes of Evidence, p 103, lines 18-21; p 105, lines 4-22.
[39] Notes of Evidence, p 66, line 2 to p 68, line 18.
[40] Notes of Evidence, p 122, lines 11-21.

gave evidence that she has never seen [Aaron] behave in the manner in which he behaves in his mother's home when [Aaron] has been in her care or the care of Mr [Scott].

[41] Thus, on the evidence, [Aaron]'s behaviour and social skills significantly deteriorated in Mrs [Carter]'s home immediately following the cessation of contact between [Aaron] and Mr [Scott]. Based solely upon Mrs [Carter]'s self-reporting, a referral has been made for an assessment as to whether [Aaron] does or does not fit within the autism spectrum or has some other behavioural diagnosis/label. Subsequently, as set out in the email from Ms Adams, Dr [Segal] has received further information from Mr [Scott] and Ms [Greerton] which needs to be considered as part of the multi-disciplinary teams' assessment of [Aaron]. It is my finding that to date there has been no expert determination that [Aaron]'s behaviours are indicative of ASD or any other behavioural disorder.

[42] Significantly, whilst Mr [Scott], Mrs [Scott] Snr and Ms [Greerton] reported on some initial behavioural difficulties with [Aaron] following the resumption of contact, they have not noticed any behavioural issues or concerns of late.[41] Indeed, Mrs [Carter] herself acknowledged that [Aaron]'s behaviours had settled down. Thus, on the evidence there is a distinct possibility that the extreme behaviours that Mrs [Carter] and her mother observed were caused by [Aaron]'s cessation of contact with Mr [Scott], and that as contact has resumed, [Aaron]'s behaviours have improved.[42] Of concern to me is that Mrs [Carter] had never considered that possibility until cross-examination by Ms Brown and Ms Adams, and even then, as I put to her, I remained concerned as to whether she still fully appreciates that is a possibility. It would be improper for me to speculate on this as a cause, as Judges are not qualified to diagnose the psychological causes of children's behaviours. I place no weight on this possible explanation.

[43] But the effect of Mr Irving erroneously reporting that there has been a diagnosis and/or making his own diagnosis of [Aaron] being on the autism spectrum is that he closed his mind to the potential for any other explanation as to [Aaron]'s behaviours,

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41 Notes of Evidence, p 18, lines 15-25; p 106, line 4 to p 107, line 12.
42 See for example Notes of Evidence, p 72 line 28 to p 73, line 6.

including the possibility that there may be a direct correlation with the cessation in [Aaron]'s contact with his father. Thus, Mr Irving's consequent narration of [Aaron] as being a special needs child has occurred without any proper determination.

[44] Mrs [Carter] has seized upon that label. Further, Mr [Scott]'s refusal to accept [Aaron] as being a special needs child has bolstered her view that Mr [Scott] is an inappropriate and unsafe parent for [Aaron].

To what extent has Mrs [Carter] and her family contributed to the difficulties in Communication?

[45] Until recently, Mrs [Carter] has refused to directly communicate with Mr [Scott] at all. Any communication she has had with him has been through Mrs [Carter]'s mother. The involvement of Mrs [Carter]'s mother, Mrs [Smith], has proven to be regrettable as she clearly has only overt antipathy towards Mr [Scott] and his family. She has directly contributed to Mr [Scott]'s sense of frustration and the difficulties in communication. For example, when Mr [Scott] attempted to discuss the issues around the burns incident with Mrs [Carter], Mrs [Smith] was antagonistic and obstructive, refusing to give any contact details for Mrs [Carter] to Mr [Scott].[43] As became apparent during Ms Brown's cross-examination of Mrs [Carter], on [Aaron]'s last birthday Mr [Scott] texted Mrs [Smith] asking if he could ring and talk to [Aaron] on his birthday. Not only did Mrs [Smith] refuse to pass on the message to Mrs [Carter], but she was obstructive and dismissive of Mr [Scott].

[46] Mrs [Carter]'s explanation as to why contact needs to be filtered through her mother is due to Mr [Scott]'s alleged ongoing abuse of her. What is clear to me on the evidence is that whenever Mr [Scott] has expressed a view contrary to Mrs [Carter]'s, expressed his frustration at being shut out of decisions in relation to [Aaron]'s life, or expressed his frustration when his requests for additional contact such as phoning their son on his birthday are met with a refusal, this is labelled by Mrs [Carter] and her mother as abusive. An example of this can be seen in Mr Howell's cross examination of Mr [Scott] where he asserted that his expression of frustration had become

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[43] As recorded by Judge Geoghegan.

abusive.[44] I disagree; there is nothing abusive in what was said by Mr [Scott]. All Mr [Scott] was doing was expressing his sense of frustration.[45] As Justice Hammond has said in *Doyle v McEwen*, social interactions, even of an unattractive nature, are not always psychologically abusive.[46] Thus, the narrative that has evolved in which Mr [Scott] is said to be intimidating and threatening is not supported on the evidence. I find that Mr [Scott] has not been psychologically abusive towards Mrs [Carter] recently.[47]

[47] An example of this ill-founded narrative can be seen in the email communication that occurred for two weeks. Mrs [Carter] agreed that Mr [Scott] could communicate about [Aaron] via email, and she established an email account to enable this communication. However, as Ms Adams put to Mrs [Carter] in her cross-examination of her, the terms of communication were not open for discussion but were rather dictated by Mrs [Carter]. That email account was shut down by Mrs [Carter] after two weeks on the basis that Mr [Scott] engaged in manipulative, controlling and abusive conduct. Yet when taken through the summary of those emails set out in the evidence Mrs [Carter] was not able to provide one concrete example in which Mr [Scott] had ever engaged in the type of manipulative, obsessive or controlling behaviour to which she was asserting.[48]

[48] Late last year in anticipation of this hearing Mrs [Carter] set up "OurFamilyWizard". It was in fact a suggestion put forward by Mr Irving in his report, but it was not until some four months later that Mrs [Carter] agreed to use OurFamilyWizard, despite Mr [Scott]'s immediate willingness to communicate through that App. The very first communication in OurFamilyWizard was in relation to the [pre-school deleted] and involved Mrs [Carter] telling[49] Mr [Scott] that [Aaron]

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44 See for example Notes of Evidence, p 37, line 24 to p 38, line 17.

45 Notes of Evidence, p 56, lines 15-18.

46 *Doyle v McEwen* [2001] NZFLR 23 (HC) at 24; sometimes reported as *Doyle v McKeown* [2001] NZFLR 23 (HC) or *D v M* [2001] NZFLR 23 (HC). I acknowledge that this is a case in relation to proceedings under the Domestic Violence Act, but his Honour's comments still resonate in this situation.

47 I acknowledge that Mr [Scott] accepted that following the relocation to [location B], he may have sent abusive texts and made abusive calls, but that was 4 years ago; there is no evidence of any subsequent abuse.

48 Notes of Evidence, p 186, line 12 to p 170, line 8.

49 Not consulting as is required of her pursuant to s 16(5) COCA.

would be enrolled in [the pre-school], and what he needed to do to make contact with that daycare. It was not a request; it was simply a dictation of what was to occur.

[49] [Aaron] has never seen his parents communicate. Mrs [Carter] has on a few occasions attended contact changeovers but has rarely gotten out of the car. Her explanation is that Mr [Scott] engages in intimidating behaviour. However, as stated above, there is no evidence that Mr [Scott] has ever engaged in any psychologically abusive behaviour towards Mrs [Carter].

[50] [Aaron] is clearly aware of the conflict in his life. An issue in this case is whether the wider maternal family, including Mrs [Carter], have actively denigrated Mr [Scott] and his family to [Aaron]. For [Aaron] has consistently stated that his mother, Mrs [Carter], and other family members have said to him that Mr [Scott] is not his real dad, that they wish Mr [Scott] was dead, and that they do not like Mr [Scott].[50] He has also said that to Mrs [Scott] snr that his mother hates her and telling Ms [Greerton] that Mrs [Carter]'s sister in Australia hates Mr [Scott]. Last year Mrs [Carter]'s father had a significant medical emergency and as a consequence Mrs [Carter] has had to take over the running of the family business. It is a home-based business run from Mrs [Carter]'s parents' home, and at present [Aaron] is effectively cared for by his maternal grandmother while Mrs [Carter] is at work in the family business. Thus, if [Aaron] remains in the care of Mrs [Carter], the likelihood that [Aaron] will continue to be exposed to these negative views is high.

[51] I also acknowledge that [Aaron] has made other statements that are clearly not true.[51] However, the consistency of the content and tenor of [Aaron]'s statements on a number of different occasions to different people has led me to conclude that [Aaron] is reporting actual conversations that he has heard, rather than simply reflecting the parent's conflict. As Ms Adams referenced in her submissions, there was some exploration of the proposition during Mr Irving's cross examination that [Aaron] was fabricating stories to try and resolve the internal conflict between his parents and to,

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50 See for example Notes of Evidence, p 109, lines 20-31.

51 For example, to Mr Irving [Aaron] said that Mr [Scott] smacked him and all parties accept this was not true.

as Mr Irving put it, secure allegiances. But in response to clarification from me, Mr Irving gave evidence that:[52]

> …my suspicion is that he must have picked up something somewhere in order to use some of those terms…he is certainly putting some concepts together, from my point of view, I haven't seen expressed as a young child like that.

[52] In light of that evidence, and the consistent narrative and nature of the comments by [Aaron], I find as proven on the balance of probabilities that Mrs [Carter], Mr [Carter] and Mrs [Smith] have actively denigrated Mr [Scott] to [Aaron].

Has Mrs [Smith] contributed to the conflict?

[53] Mrs [Smith] has on the evidence I have before me directly contributed to the conflict. Mrs [Scott] Snr gave evidence that at the changeovers she has attended, Mrs [Smith] refuses to engage in any discussion.[53] Mrs [Scott] Snr's evidence was that initially she tried to engage politely and in a friendly manner with Mrs [Smith], but she was simply ignored. She also gave evidence of her perception that the [Smith] family consider the [Scott] family to have nothing to offer [Aaron].[54]

[54] Mrs [Smith] has at times been obstructive in response to Mr [Scott]'s reasonable requests to communicate with Mrs [Carter], as exemplified by the burns incident.[55] As Mrs [Carter] accepted in cross examination, she is aware of the problems arising from her mother filtering communication with Mr [Scott] and that Judge Geoghegan had been critical of this fact in his judgment.[56] Yet Mrs [Carter] continued to insist that all communication must go through her mother. Given that she accepted in cross examination Judge Geoghegan's categorisation of her mother's attitude as unhelpful and unfortunate,[57] her insistence can only be in order to avoid actual and meaningful communication with Mr [Scott], and between [Aaron] and his father.

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52 Notes of Evidence, p 225, lines 25-29.
53 Notes of Evidence, p 120, lines 2-4.
54 Notes of Evidence, p 118, lines 1-3.
55 Notes of Evidence, p 31, lines 12-15.
56 Notes of Evidence, p 167, lines 6-14.
57 Notes of Evidence, p 167, lines 10-12.

[55] [Aaron] has expressed reluctance to show any affection towards his father when Mrs [Smith] is present, as he is concerned at her potential adverse reaction.[58] Moving forward, it is clear to me that it needs to be a condition of a Parenting Order that Mrs [Smith] cannot ever be present at a changeover. Significantly, she has chosen to not give any evidence in this hearing and thus whilst she may have some explanation as to her apparent rudeness and obstructiveness, that explanation is not before the Court.

Has Mr [Carter] contributed to the conflict?

[56] Mr [Carter] has similarly not assisted matters. Mr [Scott] asserts that during a recent Skype call that Mr [Carter] was standing behind [Aaron] while he was talking with Mr [Scott].[59] Mrs [Carter] accepted that this had occurred. Mr [Scott] gave evidence that [Aaron] told him Mr [Carter] stood over him stating, "He's not your daddy."[60] Mrs [Carter] to her credit acknowledged that her husband had been less than helpful and that she had to tell him that he was not allowed to stand over [Aaron] when Skyping Mr [Scott], and that she needed to tell him to be positive about Mr [Scott] to [Aaron]. But I have no evidence from Mr [Carter] as to whether he has accepted this advice and whether there will in fact be any change. That Mrs [Carter] felt the need to raise this issue with her husband appears to indicate that there is some substance to the anxieties of Mr [Scott].

What are the examples of Mrs [Carter] making unilateral Guardianship Decisions?

[57] There is a history of Mrs [Carter] engaging in unilateral guardianship decisions. The first occurred three weeks after [Aaron]'s birth, when Mrs [Carter] unilaterally relocated to [location B] to live with her mother. She then spent a period of some weeks living with Mrs [Scott] Snr, before returning to live with her mother and remaining in [location B]. While it was clear that there was some discussion around Mrs [Carter] relocating to [location B], ultimately there was no agreement by

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[58] Notes of Evidence, p 76, lines 1-8.
[59] Notes of Evidence, p 49, lines 16-34.
[60] Notes of Evidence, p 4, lines 24-29.

Mr [Scott], particularly when it became clear to him that Mrs [Carter] did not value him as an equal and joint parent and guardian of [Aaron]. His evidence, which I accept, is that he received threats from Mr [Smith] Snr (Mrs [Carter]'s father); while Mrs [Carter] denies this she accepts she was not present and again Mr [Smith] Snr has not provided any evidence to challenge that of Mr [Scott].

[58] It is also clear that, in relation to the various daycare centres that [Aaron] has been enrolled in, there has been no consultation with Mr [Scott] at all. For example, Ms Brown's cross examination established that [Aaron] briefly attended [daycare deleted];[61] Mr [Aaron] was never consulted about this. Further, as recently as the end of last year, Mrs [Carter] dictated that [Aaron] would attend [the pre-school].

[59] There was no communication with Mr [Scott] about the deterioration in [Aaron]'s behaviour, and Mrs [Carter] did not always communicate with Mr [Scott] in relation to the paediatric appointments. For example, on 18 October the appointment with Dr [Segal] was cancelled by Mrs [Carter]. She said she was concerned that Mr [Scott] would attend and that she did not feel comfortable with that.[62] Mrs [Carter] however decided not to tell Mr [Scott] that the appointment had been cancelled. The justification was that she believed the hospital would advise Mr [Scott] of the cancelled appointment, but in any event she said that it was a routine appointment and not particularly significant. What Mrs [Carter] failed to appreciate, and continues to fail to appreciate, is that in the absence of knowing the appointment was cancelled Mr [Scott] took time off from his business and drove from his home in [location A] to [location B] only to find the appointment had been cancelled. Even when pressed in cross-examination it appeared to me that Mrs [Carter] struggled to accept that she should have advised Mr [Scott] of her decision to cancel the appointment.

[60] The Parenting Order made by consent and approved by Judge Parsons provides as an agreement:

> If either parent wishes to take [Aaron] overseas, then the travelling parent should give the other parent four weeks' notice and should provide to the other parent a copy of the itinerary, return tickets and the contact phone number of

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[61] Notes of Evidence, p 128, line 15 to p 129, line 129.

[62] Exhibit 01 at .4.

> where [Aaron] would be staying. It is agreed that this travel will only occur during that travelling parent's contact time, and has further contact as agreed.

[61] Mr [Scott] recently wished to take [Aaron] for a holiday to Australia. He communicated this with Mrs [Carter]. My reading of the order is that, provided he gave her not less than four weeks' notice and provide an itinerary, he was entitled to take [Aaron] as of right provided it was within his contact time. Mrs [Carter] refused to provide her consent, and she also refused to provide [Aaron]'s passport to Mr [Scott], setting out a number of justifications including [Aaron] being a "special needs child". She accepted in cross-examination that there was absolutely no basis for her to make that assertion given that no formal diagnosis of Autism had been made. While she eventually agreed to the trip occurring, she did so only after Mr [Scott] had to resort to engaging counsel to resolve the issue. When her consent was finally given, it was at such late notice that the cost of the flights increased substantially, and so became cost prohibitive. As a consequence the trip to Australia with [Aaron] did not occur.[63] While Mr Howell through his cross-examination, and in his written submissions, made much of the fact that Mrs [Carter] consented to the trip, his line of questioning ignored the fact that she put up a number of unrealistic barriers including the failure to provide [Aaron]'s passport, and only consented at the very last minute so that the trip became financially impossible.

Has there been a change in attitude by Mrs [Carter]?

[62] Mrs [Carter]'s position in her evidence was that she recognises things have to change, that she will change and that she will be more supportive of [Aaron]'s relationship with Mr [Scott] moving forward.[64] Mr [Scott]'s position is that every time Mrs [Carter] appears in Court she professes a willingness to improve the situation, but immediately once the gaze of the Court is no longer upon her, she reverts back to attempting to thwart his relationship with [Aaron].

[63] There is evidence over a number of years to substantiate Mr [Scott]'s concerns. This is first evidenced by Mrs [Carter]'s unilateral relocation to [location B], her refusal to allow Mr [Scott] any significant relationship with [Aaron], and the need for

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[63] Notes of Evidence, p 7, lines 20-26.

[64] See for example, Notes of Evidence, p 173, lines 19-26.

contact to be defined by Judges Druce and Maude. It is further evidenced through the need for Mr [Scott] to apply for a warrant to enforce a Parenting Order with Mrs [Carter], and her mother asserting Judge Druce had required supervision when he had not. Thus, there is a well-established pattern of Mrs [Carter] being entirely unsupportive of [Aaron]'s relationship with his father.

[64] I acknowledge that following the Parenting Order made before Judge Parsons, there was a period in which contact proceeded without incident. However, that pattern ceased with the burns incident. As set out above, whilst Mrs [Carter]'s initial concerns and reaction were explainable, what is unexplainable is her unwillingness to accept that this was anything more than a genuine accident, her insistence upon ongoing supervision, her refusal to agree to any reasonable suggestions for proposed supervisors, and her again maintaining that obstinate view requiring Judge Geoghegan to make a determination in relation to the issues.

[65] I also consider that Mrs [Carter]'s refusal to agree to a variation to the Court order so as to provide for [Aaron]'s pickup to occur at [location D] instead of [location B], notwithstanding that Mrs [Carter] had moved from [location B] to [location D] 12 months prior, is a further example of Mrs [Carter]'s stubbornness and obstructiveness. Mrs [Carter]'s decision in that instance necessitated [Aaron] having to travel from [location D] to [location B], and then from [location B] past [location D] back to [location A] every second weekend, adding for [Aaron] up to an (unnecessary) hour and a half to his travel time. That cannot have been in [Aaron]'s best interests and welfare. Again, that situation was only rectified following judicial intervention.

[66] On [Aaron]'s last birthday, Mrs [Smith] did not allow Mr [Scott] to contact his son. Mrs [Carter] was cross examined in relation to this. It appears that she was aware of Mr [Scott]'s request. When asked why she did not agree to the request, Mrs [Carter]'s evidence was that "I just got busy and kinda forgot about it." I find it implausible that Mrs [Carter] simply forgot about it.

[67] There was disagreement regarding contact over the last Christmas holiday period, with Mrs [Carter] seeking to vary what was in the order. It is clear that in part she sought to do so as her sister was coming over from Australia and the variation

suited her. I acknowledge that this resulted in Mr [Scott] have additional contact.[65] However, it seems to me that this extra time only occurred because it suited Mrs [Carter], not as a result of focussing on [Aaron]'s best interests.

[68] In anticipation of the hearing, Ms Adams asked to see [Aaron] at the home of Mr [Scott] and Ms [Greerton]. As a consequence, it was suggested that a changeover could occur in [a midway point]. That was opposed by Mrs [Carter] who insisted that the changeover occur in [location D] as per the order, despite that being a non-sensical suggestion. In fact, she indicated that she would call the Police if the changeover did not occur in [location D].[66] That is evidence that, even up to the Court door, Mrs [Carter] was being obstructive.

[69] During the hearing Mrs [Carter] professed a willingness to attend counselling, and to for future changeovers to occur at [restaurant deleted]. She stated that she had made changes. However, when I challenged her as to what those changes were, she could only point to Skype calls, OurFamilyWizard, and an agreement to counselling.[67] All of those changes have involved her continuing to control or denigrate Mr [Scott]. For example, the Skype calls have led to Mr [Carter] standing over [Aaron], and the OurFamilyWizard was used to dictate what Day-Care [Aaron] was to attend. Her protestations of change are, I determine, self-serving and illusionary. Furthermore, she could see nothing wrong with her proposal that [Aaron] to have reduced contact with Mr [Scott]. She seeks to reduce Mr [Scott]'s contact to Saturday morning through until Sunday afternoon, her explanation being that she was concerned that [Aaron] would be too tired with all the travel when he started school.[68] Once travel time is factored in, [Aaron] would only spend around 24 hours in his father's care a fortnight under this proposal.

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65 Notes of Evidence, p 6, lines 4-18.
66 Notes of Evidence, p 138, lines 1-33.
67 Notes of Evidence, p 183, line 18 to p 184, line 23.
68 Notes of Evidence, p 184, lines 26-30.

Are there future concerns with [Aaron] remaining in Mrs [Carter]'s day to day care?

[70] There are a number of concerns that I have if [Aaron] is to remain in the day to care of Mrs [Carter]. Firstly, there are many aspects of this case in which Mrs [Carter] clearly has little insight. Furthermore, she appears to struggle to accept any responsibility on her part for what has occurred. For example, when cross examined by Ms Adams, Mrs [Carter] struggled to accept that the people she was proposing as supervisors following the burns incident were entirely inappropriate, such as Mr [Carter]'s mother. Ms Adams asked:[69]

> Was it reasonable to expect [Mr Scott] to come down and spend time in the home of your hostile husband's mother who he never met?

[71] To which Mrs [Carter] replied:

> Well I don't find it a problem. [She's] lovely…I would stand by [her].

[72] Furthermore, in July last year Mrs [Carter][70] placed the blame for the conflict entirely on Mr [Scott], and was unable to recognise the part she had played in perpetuating the conflict. I am concerned whether Mrs [Carter] will ever be capable of relating to Mr [Scott] in a positive manner and I am concerned by her inability to genuinely consider what is best for [Aaron] rather than what suits her.

[73] Secondly, the reality is that Mrs [Smith] will be providing a significant amount of care for [Aaron] if [Aaron] remains in Mrs [Carter]'s care. The unchallenged evidence of Mr [Scott] is that Mrs [Smith] has an entirely negative view about Mr [Scott], and that she actively exposes [Aaron] to those views. Given that Mrs [Smith] has not provided any evidence or been available for cross-examination, Mr [Scott]'s evidence is the only evidence that I have. It is evidence which clearly shows Mrs [Smith]'s toxicity towards Mr [Scott] and her willingness to actively engage [Aaron] in her negativity towards and about Mr [Scott]. I note that Mrs [Carter] has accepted that her mother's involvement has not been always helpful or positive.

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69 Notes of Evidence, p 178, lines 1-4.
70 In discussion with Mr Irving.

[74] Similarly, Mr [Carter] has been less than helpful in facilitating and promoting a relationship between [Aaron] and Mr [Scott].[71] Again, I have no evidence that he recognises this and that he has modified his views and behaviours. Further, I have found[72] as proven that the maternal family have consistently denigrated Mr [Scott] and his family to [Aaron]. Again, I have no evidence that this will change in the future. There are consequent risks for [Aaron] in remaining in a care arrangement where this entirely negative view of Mr [Scott] and his family is perpetuated.

[75] It is my determination therefore that there are significant risks for [Aaron] remaining in his mother's household because of the demonstrated pattern of Mrs [Carter]'s unwillingness to support [Aaron]'s relationship with Mr [Scott], and in fact her active denigration of this relationship. She holds an unreasonable and unjustifiably negative view of the risks she says Mr [Scott] presents to [Aaron]. She interprets Mr [Scott] disagreement and expressions of anger and frustration at some of her unreasonable stances as psychologically abusive behaviour. She has no insight into her own agency in the situation and her ability to easily address concerns she has by engaging in active and positive dialogue with Mr [Scott], who I find has been genuinely open to negotiate and resolve conflict for [Aaron].

[76] The concerns I have identified are not new; they were identified by Mr Irving in his July 2019 report. Despite that s 133 report, there has been no change in behaviour or apparent cognition by Mrs [Carter]. Further, she has been forewarned of the risks of such behaviour as far back as Judge Maude's decision on 6 July, where his Honour expressed concerns about the effect of the conflict on [Aaron]. Judge Geoghegan also clearly spelt out the impact upon [Aaron]'s welfare and best interests with his comment at [18] of his judgment that:

> I consider that antipathy [by Mrs [Carter] towards Mr [Scott]] and those perceptions to provide a real and present concern for [Aaron]'s continuing welfare and best interests.

[77] Thus, when previous Judges have expressed concern about the actions and attitudes of Mrs [Carter] upon [Aaron]'s best interests and welfare there has been no

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71 At [55] above.
72 At [49] to [51] above.

modification by Mrs [Carter] of her behaviours or attitudes. Furthermore, Mrs [Carter] continued to be obstructive in anticipation of this hearing, while the gaze of everyone including the Court was upon her.[73] She has recently purported to allow direct communication but dictated its terms and cut it off when she wanted to, under the unsubstantiated guise of manipulation. The evidence has shown a clear pattern of her expressing remorse after the event, but not actually doing anything meaningful to address and/or modify her behaviours and attitude. Those behaviours and attitudes have adversely impacted the welfare and best interests of [Aaron] as he has been exposed to and impacted by the conflict, and he is likely to continue to be exposed to conflict in the future because of them. As Ms Adams said in her submissions and as the Court of Appeal affirmed *Surrey v Surrey*, the best predictor of the future is past known and proven behaviour and facts.[74]

[78] That evidence showing a clear pattern of behaviours, attitudes and beliefs has led to my determination that there are significant adverse risks for [Aaron]'s relationship with his father should he remain in his mother's household. Those ongoing risks must be weighed against the significant risks in changing [Aaron]'s care.

What are the risks in changing the status quo care arrangements?

[79] [Aaron] has lived all of his life in the primary care of his mother, which has been principally in [location B]. There are obvious risks and concerns in changing [Aaron]'s primary caregiving arrangements. Since the 31 October 2017 Consent Parenting Order, [Aaron] has been having contact with his father every second weekend from Friday lunch-time until Monday at 3.00 pm, with the exception of the six month period following the burns incident in which he only saw his father towards the end of that period for three supervised access visits.

[80] Apart from the conflict with Mr [Scott] and the impact of that conflict and negative maternal family attitudes on [Aaron], there can be no criticism of Mrs [Carter]'s parenting of [Aaron]. He has been doing well in her care, although how he

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73 As demonstrated by her refusal to amend the pick-up and drop off venue to [the midway point] so as to accommodate the need for [Aaron] to meet with Ms Adams.

74 *S v S* [2010] 2 NZLR 581.

is progressing with reference to his peers cannot be established with any certainty as he is not currently attending any day care. But neither parent, nor Mr Irving, have raised any other concerns about [Aaron]'s care or development in his mother's care.

[81] I acknowledge that [Aaron]'s behaviours became particularly challenging following the burns incident and that Mrs [Carter] said to her GP at the time that she was struggling to cope. I accept her evidence that now that [Aaron]'s relationship with Mr [Scott] has been re-established, that [Aaron]'s behaviours have settled down and are not so problematic. I do not find that Mrs [Carter]'s struggles at that time were reflective of any deficiencies in her parenting.

[82] I acknowledge that Mrs [Carter] has completed the Incredible Years Parenting programme and that she has found that beneficial in her parenting of [Aaron]. I also note the criticisms made of Mr [Scott] by Mr Howell during cross-examination, in relation to Mr [Scott] not completing the Autism Incredible Years programme as recommended by Mr Irving. However, in light of the fact that no formal diagnosis of autism has been made, I do not accept that those criticism are well-founded. I do accept however that it would have been useful for Mr [Scott] and/or Ms [Greerton] to have completed an Incredible Years Parenting programme as well, so that both he and Mrs [Carter] would have completed the same programme and been made aware of the same issues for [Aaron].

[83] A change in [Aaron]'s care would involve not only the loss of a primary care relationship between [Aaron] and Mrs [Carter], but also the loss of a regular relationship with Mr [Carter], Mr and Mrs [Smith] (Mrs [Smith] in particular), and with Mr [Carter]'s son from a prior relationship.

[84] There are clearly significant risks for [Aaron] in granting, as Mr [Scott] seeks, a change in the primary care of [Aaron] to Mr [Scott], with contact between [Aaron] and Mrs [Carter]. Those risks include [Aaron] being parented by Mr [Scott] and Ms [Greerton] who have not had the primary care of [Aaron], at a time when Mrs [Greerton] is to shortly give birth to their child. [Aaron] will no doubt experience a sense of loss as his mother will no longer be available to him daily. He will move to live in [location A], although the extent to which that will be significant for him is

unknown. Mr Irving, despite acknowledging that part of his brief was to assess the advantages and disadvantages for [Aaron] of the proposed care options,[75] has not done so anywhere in his report. Thus, there is no expert evidence to provide any guidance on the psychological impacts on [Aaron] of a change to his care. I also acknowledge that changing his care will require a transfer of his paediatric care from [his current] District Health Board to an [location A] based paediatrician.

[85] Thus, there are identifiable and significant risks for [Aaron] in remaining in the primary care of Mrs [Carter] in terms of his ongoing ability to have a supported relationship with Mr [Scott]. There are also significant risks for [Aaron] in changing his care, including the loss of his significant relationships with his mother and her maternal family.

[86] The evidence I have from Mr [Scott] and his family is that they are entirely supportive of [Aaron]'s relationship with his maternal family. Mrs [Scott] Snr and Ms [Greerton], when faced with [Aaron]'s comments about his mother hating Mr [Scott], have only been supportive of Mrs [Carter]. Therefore, I have confidence that Mr [Scott] will have the total support of Ms [Greerton] and his parents with regards to any challenges that may arise if [Aaron] were to be in his primary care.

Conclusion

[87] I have given consideration as to whether another chance should be proffered to Mrs [Carter], especially in light of her willingness to change her attitude and approach. If there was some actual evidence of change on Mrs [Carter]'s part, I would have been more amendable to considering that option. However, Mrs [Carter]'s conduct has continued to reflect of a pattern of her being unable and incapable of supporting a relationship between [Aaron] and Mr [Scott] despite "warnings" from previous Judges. If anything, she continued to be obstructive even as the most recent court date loomed. There simply is no evidence of meaningful change apart from a proffered intention of a hope to change in the future.

[75] Bundle of Documents, p 134.

[88] This hope has to be weighed against Mrs [Carter] holding to a position which would reduce [Aaron]'s contact with Mr [Scott]. I accept that contact needs to change once [Aaron] starts school, but to reduce it to effectively 24 hours every second weekend is untenable.

[89] The conclusion that I have reached after considering all the evidence, the submissions of counsel, and after taking some days to weigh and carefully consider the competing issues, is that there are too many risks for [Aaron], arising out of the maternal family's lack of support of [Aaron]'s relationship with Mr [Scott], the active denigration of Mr [Scott] to [Aaron], and from [Aaron]'s continued exposure to conflict. These risks to [Aaron]'s long-term future welfare and best interests will continue if [Aaron] remains in Mrs [Carter]'s care. The consequences of allowing these risks to continue outweigh the risks in changing [Aaron]'s care. I have no confidence that Mrs [Carter] appreciates her agency or that her conduct has directly and adversely impacted upon [Aaron]'s relationship with Mr [Scott], exposed [Aaron] to ongoing conflict, and therefore adversely impacted upon [Aaron]'s best interests and welfare. The need to protect [Aaron] from the ongoing exposure to the negative attitudes and lack of support for his relationship with his father by Mrs [Carter], Mrs [Smith] and Mr [Carter] outweighs the principle that there should be continuity in [Aaron]'s care.

[90] This has not been an easy decision to reach, and I am alive to the real and tangible consequences for the parties, but most importantly to [Aaron], which will flow from this decision. It is my decision that [Aaron]'s future best interests and welfare will be met by his now being in the primary day to day care of Mr [Scott]. The risks of a change in [Aaron]'s care will be lessened by the fact that since the Consent Order, [Aaron] has been in the day to day care of Mr [Scott] and Ms [Greerton] for 4 days a fortnight, and thus living with them is not foreign.

[91] I have timed the release of this judgment to coincide with [Aaron] being in his father's care this weekend, so as to not delay his transfer of care. Mr Irving was asked by Ms Adams whether any transfer was to be immediate or part of a transitional plan. Mr Irving's evidence appears to be that any transfer should be a planned transition; I use the word 'appears' as Mr Irving was reluctant to give a clear answer on the basis

that he had not had a chance to consider that option.[76] Yet that is exactly what his brief required him to consider when asking him to report on the advantages and disadvantages of the parties' care proposals. I disagree with his apparent suggestion that it should be transitional. For the reality for Mrs [Carter] is that this decision will be devastating and traumatic, and it is unrealistic and inhumane for the Court to then expect her to calmly and rationally participate in the subsequent transition of [Aaron] to Mr [Scott]'s care. There are risks for [Aaron] in seeing his mother's increasing distress if the day of transfer was sometime in the looming future.

[92] It is for those reasons that I discharge the Final Parenting Order dated 31 October 2017 and make an immediate and Final Parenting Order in the following terms:

(a) [Aaron] is to be in the day-to-day care of Mrs [Carter] as follows:

(i) For every second weekend commencing 6 March 2020[77] from Friday, 12.00 noon until Monday at 3.00 pm.

(ii) Once [Aaron] starts school, from Friday, 6.00 pm until Sunday, 4.00 pm.

(iii) If the weekend contact is a long weekend, then [Aaron] will be in Mrs [Carter]'s care from the start of the periods of care on the first day of the long weekend and returned at 4.00 pm on the last day of the long weekend.

(iv) Once [Aaron] starts school, for 10 days in the school term holidays at the end of terms 1 and 2 from 12.00 noon on the first Saturday through until 4.00 pm on the Tuesday of the second week.

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76 Notes of Evidence, p 231, line 33 to p 234, line 21.

77 So as to allow a period for [Aaron] to settle into his new home.

(v) Once [Aaron] starts school, for the first week of the school term holidays at the end of term 3, from 12.00 noon on the first Saturday through until 12.00 noon the following Saturday.

(vi) For the first half of the Christmas school term holidays commencing at 12.00 noon on the day after school finishes in odd numbered years, and for three weeks of the Christmas school term holidays commencing on 7 January at 12.00 noon in even numbered years.

(vii) At such other times and places as the parties can from time to time agree.

(b) [Aaron] shall be in the day-to-day care of Mr [Scott] at all other times.

(c) The Final Parenting Order is subject to the following conditions:

(i) The changeover venue is to be [details deleted], unless agreed otherwise between the parties.

(ii) Mrs [Smith] Snr shall not be present at any of the changeovers and Mrs [Carter] (or such other person agreed to by Mr [Scott]) is to attend and facilitate the changeovers.

(iii) If either parent wishes to take [Aaron] overseas, then they shall be entitled to take [Aaron] overseas. However, the travelling parent shall give the other parent four weeks' prior notice and shall provide to the other parent a copy of the itinerary, return tickets and the contact phone number of where [Aaron] will be staying. It is agreed that this travel will occur during that travelling parent's contact time unless further contact can be agreed.

(iv) [Aaron] can only be taken overseas to countries that are signatories to the Hague Convention.

(v) [Aaron]'s passport is to be held by Mr [Scott], and is to be released to Mrs [Carter] if required for the purpose of booking overseas travel with [Aaron] during the periods in which she has contact/care with [Aaron]. Upon return to New Zealand Mrs [Carter] is to immediately return [Aaron]'s passport to Mr [Scott]. Mr [Scott] is to be responsible for the renewal of [Aaron]'s passport.

(vi) Both parents shall ensure that they communicate politely and respectively in front of [Aaron], and that they and their respective families speak positively about the other parent at all times.

[93] By consent I make a referral to counselling pursuant to s 46G of COCA. The purpose of the counselling is to improve the communication between the parties so as to improve the relationship between the parties and to encourage compliance with the Parenting Order. I recommend that the Registrar exercise his/her discretion under s 46M and allocate up to 12 sessions of counselling for this purpose.

[94] This being the end of the proceedings Ms Adams' appointment as lawyer for [Aaron] is terminated with the grateful thanks of the Court. Upon receipt of her final account the registrar will need to send to the parties the respective information in relation to the making of Cost Contribution Orders. I would ask that the registry attend to this as a matter of priority so that the cost contribution issues can be considered by me at the same time as the inter parties' costs referred to below.

[95] Ms Brown has foreshadowed an intention to apply for costs. If she still has instructions to apply for costs, then:

(a) A memorandum as to costs with reference to the applicable case law rules including the District Court Rules and scale costs is to be filed and served no later than 28 calendar days from the issuing of this judgment.

(b) Any submissions in reply are to be filed 14 days thereafter.

(c) The cost application will then need to be referred to me for a decision in chambers in relation to costs.

S J Coyle
Family Court Judge