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 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT THAMES

I TE KŌTI WHĀNAU
KI PĀRĀWAI

FAM-2021-075-000020
[2022] NZFC 1200

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[KATHIE BRYNN] Applicant
AND	[JAMES WALKER] Respondent

Hearing:	13-15 December 2021
Appearances:	C Flynn for the Applicant R Gregory for the Respondent P Bromiley as Lawyer for the Child
Judgment:	11 February 2022

RESERVED JUDGMENT OF JUDGE JP GEOGHEGAN

---

[1] This judgment is to determine the day-to-day care of [Marvin Walker], [under seven]. Both of [Marvin]'s parents seek his day-to-day care and while both are currently living in New Zealand, Ms [Brynn] wishes to relocate to her homeland, Canada while Mr [Walker], who is a New Zealand citizen, wishes to remain with [Marvin] in New Zealand. As with all relocation situations, the consequences for [Marvin] are significant, regardless of whether he is in the care of his mother or his father.

[2] The parties commenced their relationship in [2010] in Canada. They subsequently began living together and were married in Canada, on [date deleted] 2012. Ms [Brynn] had two children from a previous relationship, [Dalton] aged [under 15] and [Riley] aged [under 13]. Just after the parties were married, Mr [Walker] applied for permanent residency in Canada and permanent residency was granted to him in [2012].

[3] In January 2013 the parties and the children moved to [Canadian location 1], British Colombia. [Marvin] was born in [Canadian location 1], on [date deleted] 2015. Unfortunately, the parties' relationship was a tumultuous one. They separated in March 2016 after which they shared the care of [Marvin]. Court proceedings were issued and in July 2016 a consent order was made preventing either parent from removing [Marvin] from [Canadian location 1] without first obtaining the written consent of the other parent. On [date deleted] 2016 the Provincial Court of British Colombia made a parenting order, by consent, setting out a parenting arrangement for [Marvin], essentially consisted of a shared care arrangement.

[4] Prior to the parties' separation they have travelled to [the USA] and then to New Zealand.

[5] After the parties' separation Mr [Walker] entered into a relationship with another woman. When that relationship ended, the parties then began discussing the possibility of reconciliation and moving to New Zealand as a family. It was intended that that move would include [Dalton] and [Riley]. Having agreed that the family would relocate to New Zealand, Ms [Brynn] then consented to Mr [Walker] travelling

to New Zealand with [Marvin], where he would work on gaining residency for the rest of the family.

[6] Mr [Walker] arrived in New Zealand in March 2020. It was the evidence of Ms [Brynn] that the decision for Mr [Walker] to go to New Zealand at that time was prompted in part, by the growing number of Covid cases and the possibility of border closures. Mr [Walker] wanted to travel to New Zealand before it was too late. Ms [Brynn] stated that she wanted Mr [Walker] to enter into a legal document about the return of [Marvin] to provide her with "some peace of mind". She was nervous about the possibility of Mr [Walker] changing his mind and simply retaining [Marvin] in his care. Mr [Walker] did not agree to sign any legal document. Ms [Brynn] also wanted Mr [Walker] to obtain return tickets, something which he also did not agree with. Ms [Brynn] maintained that "it was implied" that the trip to New Zealand would be for no more than four months based on the experience of friends who had had a New Zealand residency application approved in 2019 in 12 weeks. It was the evidence of Ms [Brynn] that:[1]

> Mr [Walker] assured me that taking [Marvin] to New Zealand was for all of us, that he loved me, and was committed to our future together as husband and wife and as a family.

[7] Issues of trust between the parties clearly arose after Mr [Walker] left for New Zealand and on 14 April 2020, Ms [Brynn] sent a text to Mr [Walker] advising him that he no longer had her consent to be in New Zealand with [Marvin]. That text stated the following:[2]

> I need something from you. Sign an agreement that says you will not, now or ever, attempt to keep our son from me. If I cannot get NZ residency, which is completely in your hands, [Marvin] returns to Canada where we can all legally live, work and attend school.
>
> As it stands.
>
> You no longer have my consent to be in NZ with [Marvin], the intent was to visit while we obtained NZ residency for us all to move there permanently. This is not going to happen any time soon.
>
> COVID-19 has changed every way that life moves forward. There are the means and financial support to return [Marvin] and yourself to Canada. We

[1] Affidavit [Kathie Brynn] sworn 25 January 2021 at page 33, para 21 (Bundle of evidence).
[2] At page 54 – Exhibit I.

> made an agreement based on the feeling you expressed for me and plans for our future. I asked for a legal agreement before you left and you shut that down, questioning my trust in you.
>
> I am clear and kind.
>
> Please put this to rest and make an agreement that solidifies and reinforces our plans.
>
> Or bring [Marvin] home.
>
> Simple. Clear. Kind.

[8] In the months that followed Ms [Brynn] sent a number of messages to Mr [Walker] which made clear her wish for [Marvin] to be returned to Canada. She had become concerned that because of COVID-19, overseas visa applications were not being processed for New Zealand residency and that the parties actually needed to be in Canada when such an application was made.

[9] On 12 September 2020, Ms [Brynn] applied for a category of exception for a critical purpose visa in order to travel to New Zealand but was denied by immigration authorities. Subsequently, there were changes to relevant rules and in late October 2020, Ms [Brynn] was granted an exemption for an invitation to apply for a critical purpose visa and she submitted her application on 1 November. It appears that it could not be processed because completion of the application required further information from Mr [Walker] which, for some reason, he did not complete.

[10] The position became of such concern to Ms [Brynn], that in January 2021 she initiated proceedings under the Hague Convention to require the return of [Marvin] to Canada. In an affidavit in support of her application she stated:[3]

> I am not agreeable to any permanent relocation to New Zealand. [Marvin] is a habitual resident of Canada and am seeking his return to Canada. The purpose of [Marvin] travelling to New Zealand, with only Mr [Walker], was for a visit.

[11] Ms [Brynn] duly arrived in New Zealand in February 2021. Mr [Walker] says that Ms [Brynn] arrived without notice. Ms [Brynn] sent repeated messages between she and Mr [Walker] before her arrival and Mr [Walker] was sent details of flights,

---

[3] At para 55.

visas and the like. Having heard the evidence of the parties I have to say that I find it most unlikely that Ms [Brynn] arrived in the country without notice to Mr [Walker] and I prefer Ms [Brynn]'s evidence in this regard.

[12] Shortly after her arrival in New Zealand, the Hague Convention proceedings issued by Ms [Brynn] were withdrawn. That included the discharge of an order preventing the removal of [Marvin] from New Zealand, that order having been made upon the proceedings being issued. Mr [Walker] says that the parties had reached an agreement that Ms [Brynn] would stay in New Zealand permanently and [Marvin] would continue to live in New Zealand. Ms [Brynn] says that the proceedings were withdrawn on the assurance of Mr [Walker] and his sister supporting Ms [Brynn]'s application for she and the children's application for a New Zealand visa. It would appear also that Mr [Walker] had become involved in a relationship with another woman, something which clearly took Ms [Brynn] by surprise.

[13] Ms [Brynn] travelled to [location deleted] where Mr [Walker] was living and began living on a section which the parties had purchased at an earlier time and which contained limited but adequate accommodation. The parties agreed to a shared care arrangement with regard to [Marvin]. Mr [Walker] was living with his parents. The arrangement at the commencement of these proceedings was that [Marvin] spent from Sunday at 9.00 am to the following Thursday to 8.00 am with his father and the rest of the time in Ms [Brynn]'s care.

[14] On 28 May 2021, Mr [Walker] filed an ex parte application for an order preventing [Marvin]'s removal from New Zealand together with an interim parenting order granting him the day-to-day care of [Marvin]. It appears to have been triggered by an e-mail which Ms [Brynn] sent to Mr [Walker]'s counsel Ms Gregory, which stated the following:[4]

> Ruth, I hope you are well.
>
> Reaching out as a final effort to make things move forward.
>
> I reached out to Elizabeth, to contact you, yet she is retiring and cannot advise on further movement.

[4] Affidavit [James Walker] sworn 28 May 2021 – Exhibit A.

> At this point, [James] has not completed the paper work required for us to apply for residency. We have now been here for three months and we arrived at that agreement 3 weeks after we arrived.
>
> Our agreement was that I would drop the Hague conditional on us achieving residency so that we can all raise our son together in NZ or my three children and I would return to Canada. Currently the only place that we can all live, attend school and work, is back home in Canada. Can you please reach out to [James] and[Shirlee] and have then [sic] follow through with what was committed to? I can retain a lawyer here yet that puts us back to three months ago where it was clear that legal action would end all chances of a future in New Zealand.
>
> We wait in limbo and uncertainty. I cannot work here and my older children cannot attend school.

[15] The "Elizabeth" referred to in the e-mail, is Ms Elizabeth Dawe who was counsel for Ms [Brynn] in the Hague Convention proceedings.

[16] In his affidavit of 28 May, Mr [Walker] expressed concerns about the possibility of [Marvin] being removed from New Zealand by Ms [Brynn] but expressed other concerns as follows:

(a) That Ms [Brynn] and the children were living in a "shed" on the parties jointly owned section which Mr [Walker] described as:

> Unsafe and not sanitary and not suitable for children to live in. There is no toilet or running water, nor is there power or heating on the property. [Marvin] is sleeping in a sleeping bag on the floor of the shed. I have told her repeatedly that it is not safe for him and that I don't agree with this living arrangement."

(b) Three different local people had confronted Mr [Walker] in concern about [Marvin]'s living arrangements and the well-being and safety of the children.

(c) Mr [Walker] stated:

> Once the respondent is aware that I will definitely not be trying to proceed with her immigration application as a couple, I believe that she will try to take [Marvin] straight back to Canada, as she has repeatedly threatened. She has a history of mental illness and I believe that I will never see him again if she is able to leave.

[17] Mr [Walker]'s ex-parte application was directed to proceed on notice.

[18] Ms [Brynn] duly responded. She said that it was not possible for her to leave New Zealand with [Marvin] as Mr [Walker] was in possession of [Marvin]'s New Zealand and Canadian passports, something which she had not disclosed to the court. She referred to the fact that Mr [Walker] had repeatedly failed to provide her with the documentation necessary to support the visa which Ms [Brynn] was seeking. She reiterated that [Marvin] had not been living with his father in New Zealand since March 2020 with Ms [Brynn]'s consent, as that consent had been conditional on Mr [Walker] supporting Ms [Brynn]'s application for a New Zealand residency visa, something which he had failed to do. She had withdrawn her consent in April 2020. During the course of the year that [Marvin] was away, Ms [Brynn] had had Facetime contact with him on almost a daily basis. Ms [Brynn] also maintained that Mr [Walker] had a residency visa for Canada, which enabled him to live and work in Canada, whereas Ms [Brynn] was not able to work or receive any benefits and her two older children could not attend school in New Zealand. With reference to her living circumstances Ms [Brynn] stated that Mr [Walker] was deliberately exaggerating those living circumstances. She stated that she and the children were staying in a "Just Cabin cabin" which was carpeted with plenty of bedding. They had fresh drinking water and access to a neighbour's shower and toilet. Cooking was done with a small gas burner. The reason for those living circumstances was because Ms [Brynn] had found it almost impossible "to find a house for rent" in the region.

[19] As to Ms [Brynn]'s alleged history of mental illness, she stated that she had struggled with an eating disorder in the past, something which she had always been open about. She maintained that Mr [Walker] had repeatedly tried to have her go to rehabilitation for what he regarded as her alcohol use or addictions. When the parties separated in 2016, Mr [Walker] had Ms [Brynn] sectioned under Canadian mental health processes, maintaining that she had "homicidal and suicidal tendencies". She was discharged from the service in March 2016 with no further issues. Mr [Walker] also commenced a child welfare inquiry with the Canadian Ministry of Children and Family Development, his concerns being found to be unsubstantiated. Ms [Brynn] expressed her concern that Mr [Walker] had not acted in good faith in the entire process relating to [Marvin] coming to New Zealand with him.

[20] Apart from the evidence of the two parties the court heard evidence from nine witnesses, seven of whom were in support of Ms [Brynn]. They included two of Ms [Brynn]'s sisters, her mother and her former husband.

[21] The only witness in support of Mr [Walker] was a lawyer, Ms Carol Curtis who had sworn an affidavit setting out the immigration "pathway" Ms [Brynn] could follow if she wished to remain in New Zealand.

[22] At the commencement of the hearing I was required to make directions in respect of admissibility of various documents which had been annexed to Mr [Walker]'s affidavits. Included among those documents was an e-mail from Mr [Walker]'s mother dated 7 March 2016, which raised serious allegations relating to Ms [Brynn]'s parenting of the children. I determined that the e-mail was inadmissible given the prejudicial nature of the document and the fact that Ms [Walker] was able to swear an affidavit and attend court for cross-examination. For whatever reason, Mr [Walker] did not wish her to do that.

[23] Ms Curtis is a barrister and solicitor whose main area of expertise is in immigration and refugee law, an area in which she has practiced extensively for 28 years. Ms Curtis acknowledged that she had not met Ms [Brynn] and she had not sighted the visa held by Ms [Brynn] but presumed that it was a critical purpose visitor visa (which it is). It was the opinion of Ms Curtis that, presuming that a qualifying partnership was the condition on which the critical purpose visitor visa was granted (which it was) Ms [Brynn] would need to, "with haste", apply to have that condition varied or waived under s 53(1)(b) of the Immigration Act 2009. If she was successful in having that condition waived she could then study towards a work to residence visa which meant satisfying the relevant immigration policy "that is continually changing". She could apply for a student visa and on achieving the appropriate qualification apply for a post-study work visa. Ms [Brynn]'s children [Dalton] and [Riley] would be able to study, if granted student visas, but international fees may apply. Another possibility, given the circumstances of the parties failed relationship, the realities around Covid-19 and the difficulty of travelling, was that Ms [Brynn] could apply for a further visitor's visa. That however would only provide a temporary solution.

[24] A second pathway for Ms [Brynn] was to file an appeal with the Immigration and Protection Tribunal on humanitarian grounds. Ms Curtis provided the court with a decision of the tribunal in 2017 which focused on the best interests of a New Zealand born child after the Family Court had ordered that the child could not be removed from New Zealand and the parents were to share care. The child's mother was a UK citizen and faced the distinct possibility of being deported.

[25] While Ms Curtis' evidence was of assistance in understanding the pathways available to Ms [Brynn] in respect of immigration and the possibility of remaining in New Zealand, the essential point is that nothing is guaranteed. Ms [Brynn] cannot be compelled to make an application to remain in New Zealand. She has expressed her wish to return to Canada and has asked the court to determine the dispute between [Marvin]'s guardians as to relocation. The case must be decided on that basis.

[26] In the event that Ms [Brynn] returns to Canada she intends to live in [Canadian location 1] which, according to the evidence, is [details deleted]. It has a population of [deleted] with hospital, schools and other appropriate amenities. [Marvin] would be enrolled at [Canadian location 1][school deleted], the school he had attended prior to coming to New Zealand.

[27] A central plank of Mr [Walker]'s case was that Ms [Brynn] was simply not fit to care for [Marvin]. He referred to the following concerns:

(a) Alcoholism. He described Ms [Brynn] as a "chronic alcoholic" who drank heavily while pregnant and breastfeeding [Marvin]. He maintained that in January 2020 Ms [Brynn] had made an admission to him that she still had a problem with alcohol and needed to go to rehabilitation. He annexed text messages between the parties in support of that contention including a text message received from Ms [Brynn] in September 2019 where she stated:[5]

> I drink every day. I am a broken piece of shit of a human being. I will quietly die alone. Now you can walk away scarified. Because that is what you want to here [sic].

[5] Affidavit [James Walker] sworn 21 July 2021 – Exhibit B.

- Satisfied.

Mr [Walker] referred to Ms [Brynn] having a pattern of drinking for periods when she is under scrutiny and then restarting immediately. He maintained that that had happened when Canadian authorities investigated her in 2016.

(b) Bulimia. Mr [Walker] contended that Ms [Brynn] had been a chronic bulimic since age 12 and that she had been "open" with Mr [Walker] since the parties met. "That she vomits multiple times each day". Mr [Walker] stated that Ms [Brynn] "has down growing on her arms as she is so unhealthy".

(c) Transience. Mr [Walker] alleged that Ms [Brynn] did not have a home base to return to and stated that:[6]

> The reality is that there is no family or community to return to in Canada. [Kathie] is estranged from her three sisters and mother, her mother lives 10 hours away alone in a cabin, while her sisters are eight hours and just over 6 hours away from [Canadian location 1]. I have never known her to have close friends, except one who is a mutual friend, but his wife does not have [Kathie] on the property anymore. She left her older children with their father for just over one year just after we met.
>
> [Kathie] was willing to live with the children in a caravan situated in a junk yard in Canada, just as she is now willing to live with no toilet, electricity, beds, kitchen or water. That is not due to financial constraint, as she receives over $4.5 Canadian per month from her ex-husband as their matrimonial settlement which continues until [Riley] (12) turns 18.

(d) Mr [Walker] alleged that Ms [Brynn] smothered the children and did not allow them out of her sight. He maintained that she did not enable them to have outside relationships. Mr [Walker] maintained that Ms [Brynn] was "terrified" the children would see healthy behaviours and a normal way of life in a family dynamic.

---

[6] At paras 8.7 and 8.8.

[28] Mr [Walker] maintained that he was settled, happy and thriving in the [NZ region] "surrounded by his family" in a "very supportive and interconnected community". [Marvin] was seeing his paternal grandparents daily given that he was living with them and Mr [Walker] described his sister [Shirlee] as a "huge support and role model in his world, as are his cousins who all stay often".

[29] Of some note is the fact that while Mr [Walker] referred to [Marvin]'s paternal grandparents and his relationship with them together with the positive role of his sister no affidavit evidence was filed by any of those persons.

[30] There is no question that there have been concerns relating to Ms [Brynn] which have involved government agencies both in New Zealand and in Canada. A s 131 report obtained from Oranga Tamariki set out a number of concerns as follows:

> (a) 06/01/2016: concern for the children due to Ms [Brynn]'s ongoing issues with alcohol and her mental health issues. Police were called when Ms [Brynn] left the address with the children after Mr [Walker] challenged Ms [Brynn] about her drinking. Matters were addressed by police and the file was closed.
>
> (b) 07/03/2016: further concerns Ms [Brynn] was becoming intoxicated on a daily basis but was still breast feeding [Marvin]. There was an incident where whanau heard [Marvin] screaming and found [Marvin] and Ms [Brynn] had been sleeping in the same bed. Ms [Brynn] had passed out and [Marvin] had rolled off the bed and hit his head. There had been other incidents of Ms [Brynn] rough handling the older children. The Ministry assessment found that the children had been emotionally abused and neglected by Ms [Brynn]. The family returned to Canada and the Ministry was to make a report of concern to the Canadian Child Protection Service to follow up.
>
> (c) 31/05/2021: concerns for the children in the care of Ms [Brynn] due to general neglect. [Marvin] [sic] was displaying behavioural issues. Matters were before the Family Court and the file was closed.
>
> (d) 14/06/2021: concerns for the children in the care of Ms [Brynn] due to general neglect. [Marvin] was displaying behavioural issues. A referral was made for community support.

[31] As to these complaints, Ms [Brynn] was adamant that she is not an alcoholic and stated that she did not drink at all once she found out she was pregnant with [Marvin] and drank on occasion while breast feeding. She denied drinking to excess.

[32] As part of the enquiries undertaken in these proceedings a s 132 social workers report was directed, the contents of which will be discussed later in this judgment.

[33] The Court also received a report from the British Columbia Ministry of Children and Family Development ("the Ministry"), which provided a summary of child protection reports that the agency had received in regard to Ms [Brynn] and the children. The report recorded that a file was opened due to four protection reports received within a one year period between August 2015 and March 2016, with relevant themes of the reports including ongoing verbal violence, Ms [Brynn]'s alcohol misuse while caring for the children, conflict between Ms [Brynn] and her partner, Ms [Brynn]'s inability to cope, unstable housing, inappropriate physical discipline from Ms [Brynn] and Ms [Brynn]'s lack of effective communication and to follow through together with relationship challenges. The following specific incidents were referred to:

(a) August 30, 2015 – the Ministry had received a report following Ms [Brynn] being breath tested while driving and receiving what was referred to as an immediate roadside prohibition. The report stated that Ms [Brynn] smelled of alcohol but claimed that she had had only one drink at 3 pm. Ms [Brynn] explained that there had been an argument between she and Mr [Walker] over her drinking, that she decided she wished to take the children into town to have something to eat. Mr [Walker] did not want to go, the couple got into a fight over the car keys and Mr [Walker] had complained that Ms [Brynn] had "grabbed the children aggressively to get them in the car" and had thrown "the baby" (presumably [Marvin]) into the back seat. The baby was found in a car seat when Ms [Brynn] was stopped by the police. Ms [Brynn] was described as uncooperative and Mr [Walker] cared for the children for the evening. It would appear that no criminal charges were laid. There is no doubt that this incident occurred, Ms [Brynn] did not accept Mr [Walker]'s allegations regarding her placing the children aggressively in the car or throwing [Marvin] into the back seat. Ms [Brynn] stated that she was suspended for three days and had never had a warning from

the police either before or after that incident. She confirmed that she had never been prosecuted in any country for a drink-driving offence.

(b) September 23, 2015 – The Ministry received a report that Ms [Brynn] was "out of control". The report referred to Ms [Brynn] having lost 10 pounds in the past few weeks due to an eating disorder and being paranoid. Mr [Walker] was planning to leave Ms [Brynn]. The report stated that [Dalton], who was nine at the time, said that his mother often said irrational things. The report also recorded however that there were no immediate concerns when the police met with the family. It is not clear who the report of concern came from. I am inclined to think it came from Mr [Walker]. As such, the reliability of the observations contained in the report is open to question.

(c) September 26, 2015 – Mr [Walker] had reported to the Ministry that Ms [Brynn] had "a few mental health problems" and suffered from an eating disorder. Mr [Walker] complained that Ms [Brynn] was swearing and abusive towards the children and placed them in "horrible situations". He had complained that Ms [Brynn] was refusing to let him leave with [Marvin] and Mr [Walker] was concerned about the safety of the other children while with their mother. The report concluded that there was no evidence that there had been a domestic assault or that the children were unsafe.

(d) October 15, 2015 – the Ministry had received the report regarding concerns around Mr [Walker] and Ms [Brynn] constantly fighting and being verbally aggressive towards each other. The report referred to "concerns around [Kathie]'s mental health". It recorded also that Ms [Brynn] had been discharged from Psychiatry at [location deleted] and the caller reporting the concern had referred to concern regarding Ms [Brynn]'s history of alcohol and mental health. The report concluded that the Ministry did not have any concerns "as the hospital would not have released her if she was not fit to out [*sic*] of medical care". The report noted that the caller could not provide a risk to the child other

than stating concerns that Ms [Brynn] had been drinking during the past year, although no mention was made of alcohol use at the time of the call.

(e) March 12, 2016 – Mr [Walker] again contacted the Ministry. He referred to Ms [Brynn] having ongoing mental health issues and bulimia. He said that he had been in contact with a family friend who was a doctor and who had encouraged him to contact the Ministry and police immediately. Mr [Walker] had advised that child welfare services were involved in New Zealand, where the couple had been for the previous three months, and that the agency had been in touch with [Dr O'Shea], a friend of the parties in Canada. [Dr O'Shea] had apparently encouraged Mr [Walker] to contact the Ministry. The report referred to the fact that when living in New Zealand Ms [Brynn] took the children from the home and Mr [Walker] could not locate her. He expressed concern that she was suicidal and stated that Ms [Brynn] had been hospitalised due to her mental health.

(f) June 13, 2016 - The ministry received a report regarding the parents going through a separation and engaging in a verbal argument in front of the children. It is unclear who contacted the ministry.

[34] Ms [Brynn] was admitted to [hospital], in Vancouver on [date deleted], and was discharged on [3 days later]. It was the evidence of Ms [Brynn] that Mr [Walker] had arranged her admission because of alleged concerns around her "homicidal and suicidal tendencies". This, Ms [Brynn] says, is all untrue. She annexed the discharge notes from the hospital which recorded the "most responsible diagnosis", as relational conflict and a "pre-admit diagnosis" as "a mood disorder, not otherwise specified". The "post-admission diagnosis" referred there being no evidence of a major psychopathy and that alcohol abuse could be ruled out. A Dr [Gee] who had completed the discharge notes recorded:[7]

> In my impression of her, I felt that there was no major psychopathology. She was going through relational conflict and according to [Kathie], her husband

[7] Affidavit [Kathie Brynn] sworn 22 June 2021 – Exhibit E.

> was making an accusation that she was suicidal and that she also wanted to kill her children. She adamantly denied this. I told [Kathie] she must stay in the hospital for further observation, as she has been certified under the Mental Health Act.
>
> In our observations of her, we saw no evidence of depression or other major psychiatric disorders. There was no evidence of clinical depression, psychosis or mania. She was co-operative and pleasant throughout her stay. I believe there is an anxious disposition and she can be rather impatient, but I felt that there was no reason to keep her here under the certification. We also talked about her alcohol use. She does not believe that she abuses this. However, others have questioned as to whether she, in fact, meets the criteria for alcohol abuse.
>
> On March 16, we sat down and discussed about her clinical status, treatment plan, and her psychosocial situation.
>
> First of all, I expressed she is not certifiable anymore. There was no evidence that she has depression or other major psychiatric illnesses. She felt that there was no reason to stay in the hospital anymore. I agreed. As for treatment, I expressed that she and her husband should receive couples therapy. She agreed to go to the [Canadian location 1] mental team for counselling. She felt that there was no need to give her medications. She was competent to consent to her own treatment decisions. Finally, we told her that we will have to contact MCFD [Ministry of Children and Family Developments]. She is aware that they are investigating, but she is not barred from seeing her children. Hence, after she was decertified, we went through the discharge treatment forms. Subsequently she went to her home.

[35] Subsequently, Ms [Brynn] received a letter from a social worker at the Ministry, advising her that the file would be closed and acknowledging the "hard work and commitment" that Ms [Brynn] engaged in. The letter recorded that the social worker had seen positive changes in Ms [Brynn]'s mental health and her ability to protect [Marvin] and to be a healthy parent for him and her other children.

[36] On the face of it, the interaction between Ms [Brynn] and the child protection and mental health agencies took place over a relatively short period between August 2015 and March 2016. The mental health discharge notes contradict the evidence of Mr [Walker] that Ms [Brynn] suffers from mental health issues and alcoholism.

[37] Mr [Walker] provided a copy of a psychiatric assessment undertaken on him on 15 April 2016, a month after Ms [Brynn] had been discharged. The assessment was completed by a Dr Wynn of Vancouver Coastal Health. The assessment referred to

various stresses in Mr [Walker]'s life, the bulk of it being relationship orientated and concluded:[8]

> Impression and plan: [James]'s presentation is best understood as an adjustment disorder with mixed mood and anxiety symptoms in the context of a major relationship and family crisis. He describes long standing hyperthymia (high drive, lots of energy, low need for sleep) and there may be a family history given his mother's query about whether his late brother suffered from Bipolar disorder. However, he does not describe a history of symptoms consistent with hyperthymia and given the context of factors, I think his intensity, fixation on [Kathie]'s alcohol use and his emotional ability is better understood as a reaction to a very stressful situation. My impression from him today is that things are settling somewhat. He is aware that I am seeing [Kathie] for psychiatric consultation as well and I reminded him of the confidentiality of both of their separate appointments. I do not think he requires ongoing psychiatric follow up at this point; however, if the relationship difficulties continue at this intensity he may benefit from his own individual counselling.

[38] The reference by the psychiatrist to Mr [Walker]'s "fixation" on Ms [Brynn]'s alcohol use is instructive.

[39] The waters are further muddied by a significant number of text messages which were produced by Mr [Walker] and which demonstrate the complexity of the parties' relationship. The text messages cover a period from September 2011 onwards. In his affidavit evidence, Mr [Walker] contended that those texts demonstrate how Ms [Brynn]'s addictions "became apparent, continued and deteriorated, but were often hidden". There were texts from Ms [Brynn] which refer to domestic violence between her parents. There are texts from Mr [Walker] to Ms [Brynn] which berate her for her alleged addictions and replies from Ms [Walker] which appear to acknowledge those addictions. There are texts where Ms [Brynn] objects to Mr [Walker]'s depiction of her as a "jealous angry alcoholic".[9] The following text exchange occurred only six months later.[10]

> 2016 – 03-22
>
> Mr [Walker]: For someone who has brought so much hurt, pain and sadness which by the way the children and I will always remember I don't understand addictions I'm sorry, yet for me I just don't understand how a mother could continue doing hurtful things knowing full well that they hurt her own children and husband who supports her and constantly offered assistance. This baffles

[8] Affidavit [James Walker] sworn 15 November 2021 - Exhibit B.
[9] Affidavit [James Walker] sworn 15 November 2021 - Text dated 09/09/15
[10] Exhibit D.

> me to every corner of this planet. So when you tell me now you love me and want to work on us … I question you don't even care about yourself and showed that your care is limited for your children yet your now ready to work on us???? Can you please understand where I am coming from you have brought so much pain, hurt and sadness why would I want to be with you now? You have burned me in every level I'm afraid of you seriously!
>
> Ms [Brynn]: I wish I could take it all back[James] I really do. I am taking small steps and the light is brighter every day. I know you don't understand addictions, its like living in a dark hole, wanting to get out but not seeing the way, for me anyways. Removing alcohol has cleared my views and mind. Allowing me the space to move forward. Alcohol was just numbing the pain I was feeling. Preventing me from dealing with it. I do love you very much. I would like to sit with you in the presence of a professional and talk it all thru, as in life, past, present, future and everything else we can think of. We need our space from each other and I have stayed away from conversations where people tell me what to do based on their thoughts from my side of the story because there are two sides to every story and I do not want anyone to convince me to do something I don't want to do. I just talk to get it out. To share where I am at, how I feel, what I love and hate, what I feel I need to do for me, for my family and for us.

[40] This text exchange came only days after a psychiatrist had ruled out alcohol abuse on the part of Ms [Brynn] and recorded the conclusion that there was no evidence of a major psychopathology.

[41] Not surprisingly, Ms Gregory cross-examined Ms [Brynn] very closely in respect of these texts. Ms [Brynn] reiterated that she never felt her problems were as big as Mr [Walker] thought they were and did not feel alcohol was problematic within the parties' relationship. Ms [Brynn] acknowledged that she had told Mr [Walker] that she had been raped earlier in her life when that was not true. In a text to Mr [Walker] acknowledging that, Ms [Brynn] had stated with regard to that false statement that, she had "always wished [she] had some excuse for the way [she] behaved and treated [herself]." She stated that she just wanted "love and respect".

[42] Ms Gregory also cross-examined Ms [Brynn] about Mr [Walker]'s evidence that Ms [Brynn] had told him that her father had been violent to her mother, including an incident where her father had kicked her mother on the ground while Ms [Brynn] and her sisters were watching from the house. Ms [Brynn] denied that she had ever said that to Mr [Walker] and he was simply making things up. He was not. Ms [Brynn] had sent Mr [Walker] texts in which she referred to her father having been violent to her mother.

[43] [Oliver Carlton] is the former husband of Ms [Brynn] and the father of [Dalton] and [Riley]. Mr[Carlton] expressed the opinion that, while Ms [Brynn]'s life choices were "unconventional" at times, she had never put the children at risk and provided amazing experiences for them. He described the children as always being happy, healthy, motivated and engaged and that he had no concerns for them in their mother's care. He described [Marvin] as having been always happy, energetic and chatty when he saw him, which was once a month. Ms [Brynn] had maintained a healthy relationship with Mr [Carlton]'s extended family and ensured that [Dalton] and [Riley] were connected to their entire family. He said that while Ms [Brynn] had had challenges with bulimia over the years, he had never seen her engaging in "abnormal alcohol consumption". Under cross-examination, Mr [Carlton] was asked about child protection reports from the Ministry of Children and Family Development in Canada. With reference to an occasion when Ms [Brynn] was hospitalised in March 2016, the report stated Mr [Carlton] was worried about his children and the effect that recent events will have on them. He was reported as saying that he had always worried for Ms [Brynn] and her well-being and knew that she had been struggling with mental health and addictions for a long time. When that information was put to Mr[Carlton], he stated that he didn't think that is what he said to the report writer. He stated that while he had certainly referred to Ms [Brynn]'s bulimia he did not think he had ever referred to Ms [Brynn] as an alcoholic to anyone. He stated that while Ms [Brynn]'s bulimia had certainly stressed the marriage of the parties, it had never impacted upon the children.

[44] Mr [Carlton] continued to have weekly contact with his children and had no concerns for them in the care of their mother. He expressed confidence that if there was a problem [Dalton] and [Riley] would let him know. Mr [Carlton] expressed his continuing support if Ms [Brynn] stayed in New Zealand with that support being conditional upon his being able to have contact with the children and that Ms [Brynn] was not in a relationship with Mr [Walker], describing their relationship as toxic.

[45] It was clear that Mr [Carlton] and Ms [Brynn] have a very supportive and mutually respectful relationship regarding their children's care. Mr [Carlton] continues to pay Ms [Brynn] the sum of $2000 Canadian dollars per month which is to continue until their youngest child is 18. In addition to the $2000 per month, which

appears to be on account of Ms [Brynn]'s interest in a business operated by the parties during their marriage, Mr [Carlton] pays $1000 Canadian dollars per month for child support which can increase to $1500 per month depending upon the children's needs at any particular time. Mr [Carlton] also confirmed his support for meeting the educational costs of [Dalton] and [Riley] to enable them to attend school in New Zealand. Mr [Carlton] confirmed that he would be prepared to meet their schooling costs on the basis that those costs would also have to be met in Canada. He referred to being prepared to pay $15,000 to $20,000 per year.

[46] Mr [Carlton] struck me as a balanced and considered witness.

[47] Ms [Brynn]'s sister [Shyla] lives in [Canadian location 2], some seven hours drive from [Canadian location 1]. She referred to her sister as a "great parent" who listens to the children, provides healthy meals, facilitates lots of outdoor time and encourages a healthy balance between work and rest. She referred to their respective children as having a wonderful connection, she having four children aged between five and 14. She referred to the close connection between Ms [Brynn] and her sisters and their mother[Wanda Brynn], despite the fact that she did not know that Ms [Brynn] and the children were going to move to New Zealand permanently. She had thought that her sister had proposed travel between Canada and New Zealand on a regular basis. Under cross-examination, [Shyla] was asked about the suggestion that had been made in the proceedings, that Ms [Brynn] and her other siblings were the subject of abuse during their childhood. That was categorically denied by Ms [Brynn] who referred to her childhood as wonderful and also refuted any suggestion that their father drank excessively and would become angry and abusive. She also refuted any suggestion that her sister [Kathie] isolated the children and prevented them from having normal relationships outside the family. Her only concerns regarding her sister was in relation to her relationship with Mr [Walker]. She also stated that she had never noticed her sister as having a drinking problem, but that [Kathie] had spoken with her openly about her struggle with bulimia, a struggle which [Shyla] did not consider that her sister was suffering from at present. Having said that, she acknowledged that she had not seen her sister in approximately three years.

[48] Ms [Brynn]'s mother [Wanda Brynn] swore an affidavit stating that she had been concerned about her daughter since Ms [Brynn] began an association with Mr [Walker]. She regarded Mr [Walker] as something of a "sponger". She referred to Mr [Walker] wanting Ms [Brynn] to have an abortion when she became pregnant with [Marvin], and to Mr [Walker] wanting Ms [Brynn] to be declared mentally unfit in order to gain custody of [Marvin]. She referred to Ms [Brynn] as a "light-hearted person who navigates life in a positive way". She stated that she was prepared to provide whatever support, including by way of accommodation, that Ms [Brynn] and the children might need when they returned to Canada.

[49] Mrs [Brynn] lives in [Canadian location 3]. It is some 10 to 12 hours drive from [Canadian location 1]. She is presently living with her daughter,[Shyla] and intended to live with her until summer when she would return to her home in [Canadian location 3]. She referred to she and her four daughters as being quite close and connected with each other. Mrs [Brynn] was cross-examined about the marriage to her late husband and allegations that her husband had been abusive both to her and to her daughter [Kathie]. She denied these allegations and stated that any statements suggesting such a thing were untrue. Her evidence was that she had never considered that her daughter had a problem with alcohol and she had never been concerned for the safety of the children because of their mother's mental health.

[50] As with Mr [Carlton], both [Shyla] and [Wanda Brynn] struck me as straight forward and genuine in their evidence.

[51] Ms [Brynn]'s sister, [Nikki], also provided affidavit evidence. She described the [Brynn] family as "close knit" with all four sisters keeping in contact, despite living in different locations. She observed that once [Kathie] married Mr [Walker], she had noted that family occasions changed and she had the impression that Mr [Walker] was keeping her sister from the family. It was clear that she was very supportive of her sister and she referred to the family missing time to spend together. [Nikki] lives five hours drive from [Canadian location 1] but last saw her sister [Kathie] approximately three years ago. She acknowledged that although she described the family as close she had not been invited to the wedding between Ms [Brynn] and Mr [Walker] (only one of Ms [Brynn]'s sisters or her mother had been invited). She recalled her sister

[Kathie] talking about bulimia but knew nothing of any difficulty that [Kathie] was experiencing with alcohol. She was aware that [Kathie] had been admitted to a mental health ward in Canada. [Nikki] was adamant that there had been no domestic violence in her family and that she had never seen her father in a "drunken rage", something which Ms Gregory put to her. Ms Gregory also put to [Nikki] a text exchange between [Kathie] and Mr [Walker] in which she stated that her mother needed to be in a safe place and that her father once threatened that if Mrs [Brynn] had done anything, he would "burn the property and she'll have nothing". [Kathie] had referred to being told of that threat by[Nikki]. [Nikki] stated that she did not recall saying that to [Kathie]. She also did not recall ever being aware of her father having broken her mother's ribs (something put to her by Ms Gregory) or other violence. In this aspect of her evidence, I have to say that she was rather more defensive on this issue than either [Shyla] or [Wanda], although that could well have reflected an indignance at the nature of the questions being put to her. She was certainly not defensive however in expressing her concern about [Kathie]'s relationship with Mr [Walker], particularly in what she viewed as Mr [Walker]'s favouritism of [Dalton] and [Marvin] over [Riley], something which she did not like. [Nikki] was not concerned about either [Kathie]'s mental health or any issue with alcohol. She expressed support for her sister and stated that upon [Kathie]'s return to [Canadian location 1], she would provide whatever help was required and could be in [Canadian location 1] the following day if the need arose.

[52] [Minnie Clover] lives in [Canadian location 1] and is a friend of Ms [Brynn]. Her son and [Marvin] attended kindergarten together at [Canadian location 1]. In May 2020, Ms [Brynn], [Riley] and [Dalton] moved on to a property owned by Ms [Clover] where they lived in Ms [Brynn]'s RV trailer pending the expected move to New Zealand. Ms [Clover] had an opportunity to witness Ms [Brynn]'s parenting of the children and described Ms [Brynn] as a "very well-rounded parent" who modelled a "good work ethic". Ms [Clover] stated that she shared many family dinners with Ms [Brynn] several times a week. On occasions, she and Ms [Brynn] would have wine with dinner but Ms [Clover] had never been concerned about Ms [Brynn]'s alcohol consumption. In her affidavit she stated:[11]

[11] Affidavit [Minnie Clover] 17 August 2021 – Exhibit A.

> I was always super impressed at [Kathie]'s parenting. She was always consistent, level headed and really doing an amazing job raising wonderfully human beings and it clearly shows. Her kids are smart, creative, super helpful, polite, kind, healthy, resourceful, humble, engaged, have good attitudes and much more. I consider [Kathie] to be an exceptionally good mother. Present with her children, supportive, does not get complacent in parenting and sets consistent boundaries and rules.

[53] Under cross-examination Ms [Clover] repeated her observations regarding Ms [Brynn]'s use of alcohol. She described Ms [Brynn]'s use of alcohol as light and infrequent. Neither had Ms [Clover] ever had cause to be concerned for Ms [Brynn]'s mental health.

[54] Ms[Clover] confirmed that Ms [Brynn]'s RV trailer in which the family had lived, was still at her property and Ms [Brynn] and the children would be able to return and live there if they wished. Ms [Clover]'s property is four acres and there are a number of families who live there in RV's or a mobile home. Some of those families have small children.

[55] It was apparent from Ms [Clover]'s evidence that the property was not the "junkyard" referred to by Mr [Walker] in his evidence.

[56] Ms [Clover] rejected any suggestion that Ms [Brynn] had engaged in "gate-keeping" the children in the time they lived on her property. The children were involved in sleepovers, camping and interaction.

[57] Ms [Clover] struck me as an open and genuine witness.

[58] [Corrie Mable] was a former partner of Mr [Walker]. Her affidavit was extremely critical of Mr [Walker] and she described Mr [Walker] as a narcissist and referred to his infidelity and dishonesty. To that extent, her evidence was largely irrelevant. One observation was however, instructive. Under cross-examination, Ms Bromiley put to Ms [Mable] that "Ms [Brynn] had talked about Mr [Walker] going on at her about things to the point where she started to question herself" and asked Ms

[Mable] whether that was something which she had experienced. Ms [Mable] stated that:[12]

> Yeah, often [James] would I guess talk so much and talk so violently towards something that you would almost confuse, confuse what your own thoughts were and wouldn't – I guess you'd get so – its hard to explain if you haven't really experienced it yourself, then its that fast talking and overriding what you have to say to the point that you almost give up and then you can get confused about what you're actually, what you actually wanted to – what you know and what you wanted to know, so you would start thinking that you were going crazy.

[59] A s 132 report was directed in July 2021, with a brief to address all care and protection concerns raised and present for [Marvin], including all information from Canada and to comment on the parties current living circumstances. The report was prepared by Ms Rachel Fox.

[60] Ms Fox reported that a Ministry senior practitioner, Ms Bavage was the allocated social worker in response to the most recent 2021 reports of concern. Ms Bavage had recorded that Ms [Brynn] had given a good account of her current situation and that Ms Bavage believed that she was doing the best that she could with the resources available to her. She stated that Mr [Walker] had made no mention of the previous Hague Convention proceedings and his concerns regarding the children's living circumstances could have been alleviated by him moving into the home of his parents and offering Ms [Brynn] and the children the cottage he is currently residing in on his parents property. Ms Bavage recorded that she did not believe that Mr [Walker] had acted with integrity and had instead used Oranga Tamariki in an attempt to bolster his applications currently before the court.

[61] With reference to the reports of concern referred to at paragraph [30], Ms Fox confirmed that, with reference to the report of concern on 6 January 2016, Oranga Tamariki had not become involved.

[62] As to the report of concern of 7 March 2016, it would appear from the evidence of Ms Fox that the Ministry conclusion that the children had been emotionally abused and neglected by Ms [Brynn] was reached without the social worker having

[12] Notes of Evidence page 227.

interviewed either Mr [Walker] or Ms [Brynn]. The evidence of Ms Fox was that social workers met with Mr [Walker]'s parents on 10 March, but that Mr [Walker] and Ms [Brynn] had left the day before. It is not clear what Mr [Walker]'s parents had observed and there is no information as to the contents of the interview. Mr [Walker]'s parents have given no evidence in respect of the matter. In such circumstances it is difficult to see how the Ministry could reach any conclusion at all.

[63] The reports of concern in May and June 2021 had not been substantiated.

[64] Ms Fox observed that, with reference to the Canadian reports of concern there was "consistency in Mr [Walker] being the primary information giver within follow up child protection enquiries. There also appears to be some exaggeration or deliberate misinformation. An example of this is the March 2016 child protection report where it is recorded Mr [Walker] contacted family friend, Doctor [Delwyn O'Shea] ([Dr O'Shea]) upon his, Ms [Brynn] and the children's return from Aotearoa New Zealand who:[13]

> "encouraged him to contact MCFD and Police immediately", "was looking at getting his wife into [Hospital] and that everyone should be trying to get her to the hospital at this time" and "child welfare services from New Zealand have been in touch with [Dr O'Shea]". There are no case notes within Ministry computer records to evidence Ministry social workers contacted [Dr O'Shea], nor any other Canadian professional other than confirmation from Ministry International Child Protection senior advisor, Boris Fejzagic (Mr Fejzagic) of onforwarding the report of concern dated March 2016 to the British Columbia Ministry of Children and Family Development."

[65] I agree with the observation of Ms Fox.

[66] Ms Fox was unable to locate any information to suggest that Ms [Brynn] was suffering from alcohol abuse or bulimia. Ms Fox did report however as follows:[14]

> 1.6 The report writer holds concerns regarding Mr [Walker]'s persistent and vitriolic criticisms of Ms [Brynn] throughout communications with him, his defensiveness at any perceived criticism of himself and Mr [Walker]'s statements regarding Ms [Brynn]'s ability to fool child protection professionals within both Aotearoa New Zealand and Canada. Both Mr [Walker] and Ms [Brynn] spoke of [Marvin]'s reluctance to speak about activities with the other parent or show any emotional connection when the

[13] Section 132 report 1 October 2021 at para 1.3.
[14] Section 132 report 1 October 2021 at para 1.6.

> other parent is present. It is the report writer's belief [Marvin] is highly likely to be aware of the current custody proceedings and most likely Mr [Walker]'s strong negative views of Ms [Brynn], given Mr [Walker]'s difficulties in answering any of the report writers questions without resorting to a direct criticism or accusation against Ms [Brynn]. Further Mr [Walker] now has a new partner who lives with Mr [Walker] and [Marvin]. The report writer holds concerns about the direct or indirect psycho-emotional impact on [Marvin] as a result of the current custody proceedings, what appears to be Mr [Walker]'s strong dislike of Ms [Brynn], and his assumed conflicted emotions regarding Mr [Walker] have a new partner who now lives with him.

[67] In her report, Ms Fox included information from Ms Southon. Ms Southon had become involved after the Ministry had contacted [location deleted] Social Services after receiving a report of concern regarding Ms [Brynn]. Ms [Brynn] had also self-referred in June 2021 for support. Ms Southon had described Ms [Brynn]'s dwelling as "a small portable cabin, warm, clean, basic that was off the ground on a trailer and fully lined and carpeted". Ms Southon had no concerns about Ms [Brynn] and her children's current accommodation as an interim arrangement. Ms Southon had no concerns for [Dalton] and [Riley] who she met with once a week and who she described as "lovely children" and "clear and articulate". She held no concerns for Ms [Brynn]'s care of her children. Ms [Brynn] had shared with Ms Southon, Mr [Walker]'s allegations regarding bulimia and mental health concerns and Ms Southon held no concerns for Ms [Brynn]'s mental health. She was unaware of any direct or community concerns regarding Ms [Brynn] misusing alcohol. Ms Southon was particularly complimentary of what she saw as Ms [Brynn]'s positive attitude in difficult circumstances.

[68] Ms Fox had also undertaken an assessment of Ms [Brynn]'s accommodation. She described [Riley] and [Dalton] as being polite and personable in their communications and tidy in appearance. Ms Fox's assessment of the accommodation aligned with that of Ms Southon and Ms Fox also viewed the shower and toilet facilities. Ms Fox concluded that the cabin was very compact in nature with limited facilities but presented as clean, well-organised and outfitted to meet the families care needs.

[69] Ms Fox also inquired of [Riley] and [Dalton] as to how they were finding living in New Zealand. Ms Fox reported that it appeared that there was some evident resentment about their current situation although neither youth was vocal or rude in

their responses other than to acknowledge that they were looking forward to returning home to Canada. Ms Fox concluded that:[15]

> Although far from an ideal living arrangement, the cabin set up and Ms [Brynn]'s responses regarding the current methods utilised by her and her children to complete the tasks of daily life, did not raise any overt child safety concerns and in the report writer's assessment are an adequate interim arrangement, given the circumstances Ms [Brynn] and by association her children, find themselves in.

[70] It will accordingly be readily appreciated that the objective evidence with respect to Ms [Brynn]'s living circumstances does not accord in any way with Mr [Walker]'s description as "unsafe", "not sanitary", "lacking a toilet or lacking running water". Mr [Walker]'s description of Ms [Brynn]'s living circumstances could properly be regarded as misleading.

[71] Ms Fox reported that she had met with Mr [Walker] and Mr [Walker]'s parents at the home that they shared. Present also was Mr [Walker]'s partner, [Madlyn Kaye]. Mr [Walker] shared and he and Ms [Kaye] had been in a relationship for the past nine months (which would mean that when Mr [Walker] was communicating with Ms [Brynn] regarding travelling to New Zealand on the basis of a partnership visa, he was already in a relationship with Ms [Kaye]). The first meeting between [Marvin] and Ms [Kaye] had occurred in February 2021. Ms Fox noted that during the course of the interview Mr [Walker] advised her that he did not speak negatively about Ms [Brynn], her children or the Family Court proceedings in front of [Marvin], but then told her that he had repeatedly asked [Marvin] if Ms [Brynn] said negative things about him. According to Mr [Walker], he and Ms [Kaye] had met at the end of 2020 and developed a friendship which in May 2021, transformed into "a serious and romantic relationship". Ms [Kaye] and Mr [Walker] commenced living together in August 2021. Ms Fox assessed Mr [Walker]'s accommodation as being well equipped for [Marvin]'s care. That accommodation consisted of a cottage located on the same land as Mr and Mrs [Walker] seniors' home. Given that the cottage was open plan, Ms Fox had recommended that in view of Ms [Kaye] and Mr [Walker] living together, consideration should be given to provide [Marvin] with his own separate bedroom. It

[15] At para 2.34.

is clear however that Mr [Walker]'s physical environment is appropriate for [Marvin]'s needs.

[72] Under cross-examination Ms Fox described both Mr [Walker] and Ms [Brynn] as personable but that it was Mr [Walker]'s default position to embark on criticism of Ms [Brynn] and he had a tendency to repeatedly refer to those criticisms or accusations even when a question had nothing to do with Ms [Brynn]. She expressed her agreement with the conclusion of Ms Bavage that Mr [Walker] had used Oranga Tamariki to bolster his case against Ms [Brynn]. Mr [Walker] had appeared to be evasive to Ms Fox when discussing his relationship with Ms [Kaye]. When Ms Fox had originally asked Mr [Walker] whether he had a partner he refused to answer the question on the basis that he did not consider it was relevant. Ms Fox referred to discrepancies in what were told by both Mr [Walker] and Ms [Brynn] about the timing of their relationship.

[73] By contrast, Ms Fox described Ms [Brynn] as being able to remain focused while being questioned with the only negative feedback about Mr [Walker] occurring when Ms Fox spoke to Ms [Brynn] about their relationship.

[74] It was clear from Ms Fox's evidence that she considered Ms [Brynn] to be doing an admirable job in the care of the children in trying circumstances and that she had no cause for concern in respect of their care.

[Marvin]'s views and wishes

[75] [Marvin]'s views were communicated to the court through reports from his counsel Ms Bromiley. It was not suggested that [Marvin] engage in a judicial interview. In her report dated 25 June 2021 Ms Bromiley reported that [Marvin] appeared to be a happy boy at school and was described by his school as:

> Well behaved, polite and well mannered, friendly and mixes well with his peers and with adults. He is always outgoing and not reticence. He gets on with the job and does things he can. He presents well with clothing, food and cleanliness.

[76] The school reported no concerns for [Marvin] although his academic achievement was regarded as "a bit below standard". The school reported a good working relationship with [Marvin]'s parents.

[77] Ms Bromiley described [Marvin] as positive, full of smiles, not shy and quite able to answer her questions. He was able to tell Ms Bromiley about living in Canada and he described [Canadian location 1] as "cool". He referred to having his family around him there with the exception of his grandparents in New Zealand. He was not sure which country he liked best and said that he did not want to have to decide between them. He saw both of his parents as "cool" and he couldn't think of anything bad about either of them. With reference to his living conditions with his mother he regarded that as "fun". He was content with his shared care arrangement. He referred to being sad when his mother and siblings were in Canada but stated that he talked to them all the time. He was close to his New Zealand grandparents.

[78] In a subsequent report from Ms Bromiley dated 16 November 2020, things did not seem as happy for [Marvin]. Ms Bromiley stated that during her first interview with him he presented as a happy and cheerful boy and on this occasion he appeared much more reserved and significantly impacted by his parents conflict. When Ms Bromiley asked [Marvin] how Mr [Walker]'s partner fitted into the family, she noted that [Marvin] was reluctant to answer the question. She referred to [Marvin] as reluctant to talk, quiet and displaying body language that was self-protective. [Marvin] was clear that he did not wish to make a decision about which country he wanted to live in but what he did want the Judge to know that he loved both of his parents equally. He did not want to meet the Judge. [Marvin] clearly wanted to see both of his parents.

[79] Of some concern was the fact that Ms Bromiley reported that Mr [Walker] had told Ms Bromiley that the weekend before her meeting with [Marvin] there had been "an incident" at his mother's home. When asked if he would advise what that was, Mr [Walker] declined to do so indicating that professionals had "looked the other way" in the past. Ms [Brynn] could recall no such incident. Mr [Walker] also expressed concerns that [Marvin]'s relationship with his brother [Dalton] may be

"inappropriate". Despite this comment to Ms Bromiley, this allegation was not advanced in evidence by Mr [Walker].

Discussion

[80] When stepping back and considering the evidence given by Mr [Walker] and Ms [Brynn] with reference to their relationship, I consider that they were in a deeply concerning and wholly dysfunctional relationship which has a distinct pattern of Mr [Walker] incessantly complaining about Ms [Brynn]'s alleged deficiencies as a mother and Ms [Brynn] responding by trying to placate Mr [Walker]. While there is no doubt that Ms [Brynn] suffers from bulimia that would, at times, have impacted the parties' relationship, I am not satisfied that the evidence, when taken into account with all the other evidence, establishes that Ms [Brynn] is an alcoholic who presents a danger to her children. There is simply too much evidence which contradicts the evidence of Mr [Walker]. In reaching that conclusion I acknowledge the texts sent by Ms [Brynn] to Mr [Walker] but that is explained by the very unhealthy dynamics of the parties' relationship.

[81] What was a danger to the children, was the deeply dysfunctional nature of the relationship between Mr [Walker] and Ms [Brynn]. In her cross-examination of Mr [Walker], Ms Flynn had referred to the term "gas lighting" in describing the nature of the parties' relationship and in particular, the nature of Mr [Walker]'s communications with Ms [Brynn]. "Gas lighting" is a term to broadly describe psychological manipulation intended to have the recipient doubt their own sanity or reality. Having considered the evidence as a whole, there are concerning aspects of the parties' communication which leads me to the view that that is exactly what was taking place. Ms [Brynn] was always endeavouring to placate Mr [Walker] in an endeavour to make their relationship work. I am of the view that that included acknowledging to Mr [Walker] the validity of his concerns, regardless of whether those concerns were warranted.

[82] I was not impressed by the evidence of Mr [Walker]. I consider that Mr [Walker] is not a particularly reliable witness and I agree with the assessment of Ms Fox that he had a tendency to focus on criticisms of Ms [Brynn] and to criticise her

whenever the opportunity arose. There are specific areas of concern in relation to his evidence however and I set those out as follows:

(a) I regard Mr [Walker] as having been less than honest in providing evidence in support of his initial without notice application. While he stated that Ms [Brynn] had arrived in New Zealand without notice that was clearly untrue. Mr [Walker] acknowledged having notice but endeavoured to mitigate his answer by saying that "there was always flip-flopping around from different dates and that sort of thing". Mr [Walker] acknowledged that he knew that Ms [Brynn] was flying from Canada to New Zealand and arriving in New Zealand on 23 February. Mr [Walker]'s effort to put that down to stress rings hollow. Additionally, Mr [Walker] did not disclose that despite his fears regarding Ms [Brynn] removing [Marvin] from New Zealand she was not in a position to do so as he held [Marvin]'s New Zealand and Canadian passports. He did not disclose that on 17 March 2021 the parties, had by consent, agreed to discharging an order preventing removal of [Marvin] from New Zealand with that agreement having been reached after Ms [Brynn] had entered New Zealand. In addition, after the objective evidence regarding Ms [Brynn]'s accommodation, I consider Mr [Walker]'s description of Ms [Brynn]'s living circumstances to be significantly misleading. There were simply no grounds at all for Mr [Walker]'s belief, expressed in the affidavit, that Ms [Brynn] would keep [Marvin] away from him and/or continue to live in "an extremely unsafe living situation to the detriment of his health, well-being, and stability".

(b) Mr [Walker] was equally misleading when he spoke of Ms [Brynn] being "estranged" from her sisters and mother. The evidence of her sisters and mother (which I accept), completely contradicted that. Equally misleading, Mr [Walker]'s description of Ms [Brynn]'s mother living alone "in a cabin". Photographs of Mrs [Brynn]'s "cabin" did not remotely match up with Mr [Walker]'s description. Although Mr [Walker] tried, in his evidence, to explain what he meant by

"estrangement" and "cabin" his evidence was completely unconvincing and I am satisfied that his descriptions were deliberately intended to place Ms [Brynn] and her family in the worst possible light.

(c) I have reached the conclusion that Mr [Walker] was completely dishonest with Ms [Brynn] in his dealings with her regarding she, [Dalton] and [Riley] coming to New Zealand and living together as a family. Knowing that Ms [Brynn] felt increasingly nervous about the delays in having the partnership visa processed, to a point where she withdrew her consent for [Marvin] to be in New Zealand, Mr [Walker] continued to engage a course of action which, in my assessment, led Ms [Brynn] to believe that she was travelling to New Zealand in order to reunite with Mr [Walker] for the purposes of being together as a family. That was despite the fact that Mr [Walker] was in a developing relationship with Ms [Kaye]. While Mr [Walker] suggested that that relationship only became serious in May, I simply reject that evidence as being most unlikely, particularly given that Mr [Walker] and Ms [Kaye] began living together in August 2021. Mr [Walker] was not honest with Ms [Brynn] resulting in a situation where Ms [Brynn] not only travelled to New Zealand from Canada bringing her other children with her, but then withdrew her application under the Hague Convention. I consider all of this to be designed by Mr [Walker] to increase the chances of being able to obtain the day-to-day care of [Marvin]. Had Ms [Brynn] known the reality of the position I am of the view that she would have remained in Canada and initiated proceedings under the Hague Convention from there.

(d) I am of the view that Mr [Walker] has exaggerated the issues arising from Ms [Brynn]'s bulimia and alcohol use in a deliberate attempt to bolster his own case. In reaching that conclusion I acknowledge that he has also described her in very positive ways. Any praise however, seemed to have a barb attached to it.

[83] The evidence in this case draws me to the following conclusions:

(a) [Marvin] is not unsafe in the care of his mother. The evidence satisfies me that while she has in the past suffered from bulimia that is a condition which does not affect her ability to care for the children. Her alleged alcohol addiction has not been substantiated. I have already given the reasons as to why I have drawn that conclusion.

(b) The evidence of those who gave evidence on behalf of Ms [Brynn] together with the s 132 report and the evidence of Ms Fox satisfies me that Ms [Brynn] is a competent and loving parent who is able to provide for [Marvin]'s day-to-day care.

(c) Mr [Walker] was not open and transparent in his dealings with Ms [Brynn], leading firstly, to her making the decision to allow Mr [Walker] to take [Marvin] to New Zealand and secondly to moving to New Zealand with [Dalton] and [Riley] and thirdly, withdrawing her Hague Convention application. Had Mr [Walker] been honest with Ms [Brynn], while she may still have permitted him to leave Canada with [Marvin], she would have prosecuted her Hague Convention proceedings and not withdrawn them.

(d) I accept Ms [Brynn]'s evidence that if she were to return to Canada and be able to re-establish herself in [Canadian location 1] and that she has the family support and financial means to do so.

(e) If Ms [Brynn] were not permitted to remain in New Zealand (a distinct possibility), [Marvin] would be separated not only from his mother but also from his half-brother and sister who he is closely bonded to. While the focus of this hearing must of course be on [Marvin] there is some evidence to suggest that [Dalton] and [Riley] are not settled in New Zealand and wish to return to Canada where they can be close to family. [Dalton] and [Riley] are very important members of his family.

(f) There is clear evidence that Mr [Walker] has the ability to live and work in Canada if he wishes. While I acknowledge he does not wish to do so, that is not the point.

(g) While [Marvin] has family links in New Zealand it is not possible to assess the importance of those links. That is because none of Mr [Walker]'s family gave evidence. Mr [Walker] is in a new relationship and it is also impossible to assess the stability of that relationship. It would appear however, from what evidence there is, that [Marvin] is close to his paternal grandparents. As against that, I am satisfied that [Marvin] has very close links to the family in Canada.

(h) Given the conclusions which I have reached regarding the parties' relationship I do not consider Ms [Brynn]'s wish to return to her homeland as unreasonable.

(i) If [Marvin] were to remain in New Zealand with his father I have some concerns about the extent to which Mr [Walker] would support [Marvin]'s relationship with his mother given the conclusions I have drawn from the evidence. I do not share the same concerns with reference to Ms [Brynn] supporting [Marvin]'s relationship with his father.

(j) If [Marvin] were to return to Canada he would be relocating to [Canadian location 1], a town he has lived in and has been familiar with.

(k) Given that Mr [Walker] has no other children I consider that it would be easier for Mr [Walker] to travel to Canada to see [Marvin] than it would be for Ms [Brynn] to travel to New Zealand.

[84] Counsel agreed on the leading authorities on the issue of relocation and the principles arising from them.

[85] In *Kacem v Bashir* [16] the Supreme Court discussed the misconception, that in relocation cases the Court is exercising a discretion and stated:

> As we have seen, the Court is not in fact exercising a discretion; it is making an assessment and decision based on an evaluation of the evidence. It is trite but perhaps necessary to say that Judges are required to exercise judgment. The difficulties which are said to beset the field are not conceptual or legal difficulties; they are inherent in the nature of the assessment which the Courts must make. The Judge's task is to determine and evaluate the facts, considering all relevant s 5 principles and other factors, and then to make a judgment as to what course of action will best reflect the welfare and best interests of the children. While that judgment may be difficult to make on the facts of individual cases, its making is not assisted by imposing a gloss on the statutory scheme.

[86] What is clear from *Kacem v Bashir* is that each principle in s 5 should be considered to determine whether it is relevant and, having been identified as relevant, an assessment undertaken to determine how each relevant principle is to be taken into account. That is not a formulaic approach but a highly individualised one. Clearly also, the statutory principles are not exhaustive and the Court is also entitled to take into account other matters relevant to a child's welfare and best interests. There is no presumption against or in favour of relocation. There are however some principles likely to be relevant to relocation disputes and in *Kacem v Bashir* the Supreme Court stated:

> At the highest level of generality the competition in a relocation case is likely to be between declining the application for relocation because the children's interests are best served by promoting stability, continuity and the preservation of certain relationships, as against allowing it on the ground that the interests of the children are thereby better served. Put in that way, it is difficult to see how any presumptive weight can properly be given to either side of those competing but necessary abstract contentions. To do so would risk begging the very question involved in what is necessarily a fact-specific inquiry.

[87] In the High Court judgment in *S v O* [17] , Wild J referred to a number of factors identified in the Family Court as potentially relevant in most relocation cases and which were as follows:

> (1) The relocating parent's capacity to value the input of the other parent, and to facilitate and encourage access by the other parent.

---

[16] *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, (2010) 28 FRNZ 483 at [35].
[17] *S v O* [2006] NZFLR 1, (2005) 25 FRNZ 259.

(2) The non-moving parent's capacity to demonstrate continued interest in the children after relocation.

(3) The extent and focus of conflict between the parents, either underlying or resulting from a decision to relocate.

(4) The practical consequences of relocation (transport, costs, accommodation) and of declining relocation (financial or employment consequences for the relocating parent).

(5) The distance between the two parents' homes.

(6) The impact of granting (or declining) relocation on the children's family and social support networks.

(7) Cultural, social and spiritual considerations.

(8) The children's previous living arrangements (i.e. number of previous moves) and the suggested new living arrangements (i.e. whether the children have lived there before).

(9) The merit and reasonableness of the parent's wish to relocate.

(10) The extent to which the children's relationship with the non-moving parent will be affected.

(11) The wishes and needs of the child or children.

(12) The impact of granting or declining relocation on the children.

[88] Section 5 of the Care of Children Act 2004 provides as follows:

5 Principles relating to child's welfare and best interests

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

(a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in **[[**sections 9(2), 10, and 11 of the Family Violence Act 2018**]]**) from all persons, including members of the child's family, family group, whānau, hapū, and iwi:

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

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

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

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

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

[89] In Ms Gregory's submissions on behalf of Mr [Walker], she submitted that the parties had previously agreed to bring [Marvin] up in New Zealand regardless of whether their planned reconciliation was successful. She also submitted that Mr [Walker] was unable to return to Canada and would not do so. As to the agreed plan, I do not accept that submission. As I have already observed, this relationship was a highly complex one with difficult dynamics. My view of the evidence is that Ms [Brynn]'s desire to travel to New Zealand was based on Mr [Walker]'s clear encouragement in respect of a joint future, in circumstances where he was being less than honest with Ms [Brynn]. As to Mr [Walker]'s inability to return to Canada, it is simply based on his own preference. He is not faced with any legal difficulties in returning to Canada, while Ms [Brynn] faces significant legal hurdles if she were to try to remain in New Zealand. It will also be evident from the conclusions that I have reached, that I do not accept the submission of Ms Gregory on behalf of Mr [Walker], that the nearby involvement of Mr [Walker] and his family is a crucial protective factor for [Marvin].

[90] Ms Gregory also submitted that if Ms [Brynn] moved to Canada it was unclear where she would live and that if she chose to live at her mother's property judicial notice could be taken that the property is extremely isolated 14 hours from [Canadian location 1] and three hours from any possible work. I decline to take judicial notice of the submitted isolation and unavailability of work as it is not a matter of judicial notice but rather, an assessment of the evidence. The evidence suggests that Ms [Brynn] will return to [Canadian location 1], but in any event, she has the support of her family and my assessment of that support is that it is both genuine and available. There is no evidential basis for believing, as submitted on behalf of Mr [Walker] that Ms [Brynn] would "drop off the radar" to the extent that he would not have regular contact with [Marvin]. I am satisfied that the evidence establishes that Ms [Brynn] would continue to foster and nurture [Marvin]'s relationship with his father. I do not have the same confidence in Mr [Walker].

[91] While Ms Gregory submitted that leaving [location deleted] would unacceptably disrupt [Marvin]'s primary attachment to his father, education, friendships, relationships with his wider family and living situation with his paternal grandparents of nearly two years, the court must also take account of the fact that most of [Marvin]'s life had been spent in Canada, the country where he was born.

[92] Ms Gregory also submitted that [Marvin] had Maori whakapapa through his paternal family, which Mr [Walker] is yet to explore. As to that submission, I merely observe that any alleged whakapapa was afforded absolutely no significance in the hearing at all and there was no evidence regarding that issue. I accordingly decline to take account of it.

[93] For the reasons set out in paragraph [83] I have reached the conclusion that I should grant Ms [Brynn]'s application to relocate [Marvin] to Canada.

[94] I have considered whether, or not, as part of that decision, I should impose a condition which requires Ms [Brynn] to exhaust all available avenues open to her to obtain residency status before leaving NZ. I am not prepared to impose such a condition. The principal reason for that is that I consider it would simply expose [Marvin] to greater uncertainty regarding his circumstances and would impose unnecessary and unwarranted stress, not only on the parties, but also on [Marvin] and his siblings. If the parties were to reach an agreement of that kind between them then that is for them. I am of the view however that the court needs to provide certainty to the parties and that the best way to do that is to make an order which entitles Ms [Brynn] to leave New Zealand at the earliest opportunity.

[95] As to the parenting arrangements which would apply when [Marvin] is relocated to Canada, Mr [Walker] seeks contact with [Marvin] each year for a period of two months namely, six weeks over the New Zealand summer period and three weeks in the New Zealand winter period. He proposes that the costs would be equally shared. His preference is that the parties would arrange the best possible two monthly period for [Marvin] each year depending on his schooling requirements and other needs.

[96] Ms [Brynn] provided evidence that the Canadian and New Zealand school years do not align, the New Zealand school year beginning in February and running through to mid-December while the Canadian year starts in September and runs to the end of June. The Canadian school summer break is seven to nine weeks from the end of June until the first Tuesday in September. That clearly creates some practical issues in respect of contact.

[97] Ms [Brynn] proposed that if [Marvin] were to return to Canada she would like to see him come to New Zealand for a month over the Christmas holidays and a month over the summer holidays (which I assume are to mean the Canadian summer holidays). She also suggested that Mr [Walker] come to Canada to spend time with [Marvin] over the Canadian summer holidays. Ms [Brynn] has no difficulty with [Marvin] spending each Christmas with his father.

[98] While I completely understand the reasons for the care arrangement proposed by Mr [Walker], the arrangement must be one which accommodates [Marvin]'s needs and provides for his ongoing education. Accordingly, I consider Ms [Brynn]'s proposal to be a more realistic one.

[99] In reaching a decision that [Marvin] should return to Canada with his mother, I appreciate this will come as a very considerable blow to Mr [Walker]. Decisions of this kind are never easy and they inevitably impact a child's relationship with one parent in very significant ways. What is clear however, is that [Marvin] loves both of his parents very much and they have a great deal to contribute to him. I am of the view that despite the evidence of tensions and conflict between the parties they both share a genuine desire to do their very best for [Marvin] and I wish them the very best in that continued journey.

[100] Accordingly, I make the following orders:

(a) I grant Ms [Brynn]'s application for a guardianship direction that [Marvin] be returned to Canada and make that direction.

(b) I discharge the order preventing the removal of [Marvin] from New Zealand dated 28 May 2021.

(c) I make a parenting order providing for [Marvin]'s care as follows:

1. Pending the return of [Marvin] to Canada is to be in the care of his father on Sunday at 9.00 am to the following Thursday at 8.00 am and in the care of his mother at all other times.

2. Upon the return of [Marvin] to Canada, [Marvin] is to be in the day-to-day care of his mother and is to have contact with his father as follows:

   (i) For four weeks in New Zealand each year, commencing on the day after the close of school in Canada for the Christmas break and ending four weeks later. For the sake of clarity, any travel time for [Marvin] is to be included in the calculation of the four-week period. Accordingly, [Marvin]'s travel to and from New Zealand must occur within that four-week period.

   (ii) For four weeks in New Zealand, at any time during the Canadian school summer break in July and August each year, with the exact dates to be agreed between the parties.

   (iii) For a period of up to four weeks consecutively or for separate periods not exceeding a total of four weeks in any one year, in Canada provided that [Marvin] is not to miss any school during such contact and that Mr [Walker] provides Ms [Brynn] with no less than 30 days notice of his intention to exercise contact including providing details of the duration of contact and his

intended travel with [Marvin] during the period of contact.

(iv) Electronic or telephone contact no less than once a week.

(v) Contact at other times as agreed.

(d) It shall be a condition of the parenting order that any travel costs for [Marvin]'s travel between Canada and New Zealand are to be met by each parent equally, provided that the responsibility for arranging the travel will rest with Mr [Walker] after due consultation with Ms [Brynn]. Ms [Brynn] is to provide half of the cost of travel upon receiving satisfactory information from Mr [Walker] regarding the need for payment on the requested date. For the sake of clarity the cost of travel is for [Marvin]'s airfares only and it shall be Ms [Brynn]'s responsibility to provide transport for [Marvin] to and from the appropriate airport in Canada and Mr [Walker]'s responsibility to provide transport to and from the appropriate airport in New Zealand.

(e) Ms Flynn's appointment is terminated with the thanks of the court, effective 21 days from the date of this judgment to enable her to speak with [Marvin] regarding the judgment.

_____

Judge JP Geoghegan
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 11/02/2022