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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2018-019-000332
[2024] NZFC 3816**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[PATRICK GULLY] Applicant
AND	[GAYLE BEAKER] Respondent

Hearing: 5, 6 and 7 March 2024

Appearances: T Hack for the Applicant
Respondent appeared in Person
S de Luen as Lawyer for the Child
J Sutton as Counsel to Assist

Judgment: 28 March 2024

RESERVED JUDGMENT OF JUDGE D A BURNS
**[In relation to parenting orders and resolution of guardianship dispute relating
to location and schooling]**

[1] This case concerns the life of one child named [Aspen Beaker Gully] born [date deleted] 2011 ([12 years]). The applicant is his father and the respondent is his mother.

[2] [Aspen] was born in Canada. He and his parents moved to New Zealand in 2013. [Aspen]'s home town became [location A], although initially upon arrival in New Zealand there were periods in the [location B] region. The parties separated on or about February 2018. They attempted an arrangement referred to "bird nesting", each utilising the [location A] home for their periods of care of [Aspen].

[3] Until the first half of 2019 father had a job [overseas]. He was back in New Zealand for blocks off from work. Post-separation, Ms [Beaker] worked where she could in [location A] whilst [Aspen] was at school.

[4] Both mother and father made a guardianship decision that [Aspen]'s preschool was Kaupapa Māori based and he then went into the immersion unit at [School 1].

[5] Once father's job [overseas] had finished in 2019, the parties operated for the balance of the year a split care arrangement in [location A], whereby [Aspen] was with his father for four days and then his mother for three days.

[6] Mother successfully obtained an interim spousal maintenance order on 27 August 2019 against father.

[7] As it transpired, father was not in employment further into 2019 and through to the point of issue of proceedings in the Hamilton Family Court in May/June 2021.

[8] In the second part of 2019 mother pursued a position with the [employment details deleted]. Somewhat to mother's surprise she was successful in securing the position [in December] 2019. Going into 2020, Ms [Beaker] started her recruitment training which was based for a period in [location C]. Mother would have preferred to have had [Aspen] in her care through that new stage of her working life but there was non-agreement about this. Father sought to have the care of [Aspen] still based in [location A]. In that time, mother wanted [Aspen] in her care each weekend, but

the outcome was for her contact each second weekend based upon what father would agree to.

[9] In or about April 2020 mother moved to [area deleted] of Auckland to start her new job at the [employment details deleted], being the only set shift position in the [place of employment] from Monday to Friday 7am – 5.30pm. Mother had wanted [Aspen] in her care in Auckland but this was not agreed to. Mother had [Aspen] each second weekend in Auckland. She found this period of time difficult.

[10] [Aspen] therefore remained in [location A] in the care of his father and continued at [School 1] in the immersion unit. Accordingly, because they could not reach a guardianship decision to change school and for [Aspen] to change location he remained in [location A] and at the school that they had agreed together and subsequently. The evidence shows the parties did agree on him living in [location A] and attending [School 1] in the full immersion unit. It was the last occasion that the parties were in agreement about guardianship issues.

[11] In January 2021 [Aspen] mentioned to his mother that the [location A] house father and [Aspen] were living was going on the market. On 14 January 2021 mother emailed father to ask about his plans and said “second, I would like to remind you that legally you are not able to move [Aspen] out of his current community without my permission. And I respectfully say now that I would not give you my permission to have him taken from [location A]”.

[12] In the same email mother raised her ongoing concern about her limited contact with [Aspen] and suggested giving the housing situation for father it might be an opportunity for him to consider a move closer to Auckland so that [Aspen] could spend more time with her.

[13] Father wrote in response on 16 January 2021, confirming his accommodation was on the market and that he had secured a suitable place in [location A]. Father raised this concern about mother’s alleged discussion with [Aspen] and he said “if I choose to live away from [location A] I will inform you”.

[14] Subsequently father applied for a position as [employment details deleted].

[15] Father was offered a position on 6 May 2021 and accepted it on 7 May 2021. [Aspen] had contact with his mother over the following weekend. It was on 10 May 2021 that father told mother about his new position.

[16] There was disagreement between the parties about any move by [Aspen] from [location A]. The parties went to urgent mediation on 24 May 2021 remotely. There was no agreement between them as to two guardianship matters, namely location and change of school.

[17] On 26 May 2021 father made a without notice application for a parenting order as to day-to-day care and for a ruling pursuant to s 46R of the Care of Children Act 2004 ('the Act') seeking a guardianship direction enabling the child's relocation to [location D]. The applications were declined and placed on notice.

[18] On father's decision, he and [Aspen] left [location A] on 30 May 2021. [Aspen]'s paternal aunty [Geraldine] looked after him in Auckland until 2 June 2021, at which time father's partner [Karen] collected [Aspen] from Auckland and took him northward to [location D]. Father was by that point already in [location D].

[19] Mother made a without notice application for a parenting order as to day-to-day care on 31 May 2021 which was also placed on notice. The presiding duty Judge in her minute specifically recorded that father should not have proceeded with his plans to relocate the child to [location D].

[20] [Aspen] was withdrawn from his school in [location A] [in mid-2021]. This was without the consent of mother.

[21] Mother says that there was a period between 29 May 2021 and 2 June 2021 during which her attempts at making contact with [Aspen] and father were unsuccessful.

[22] Mother was due to have her fortnightly weekend with [Aspen] for the weekend of 5 and 6 June 2021. Father did not permit that contact to take place. He contended that it was necessary to isolate [Aspen] from the difficult situation and he would have been unsure about [Aspen]'s return to him at the conclusion of contact. The irony is that he acted unilaterally on the basis that he thought that mother would act unilaterally. There is a contradiction as a result.

[23] Proceedings were called in the Hamilton Family Court on 9 June 2021 in which time an interim parenting order was made for [Aspen] to be in the shared week about care of his parents with ongoing changeovers on Sunday. This arrangement acknowledged that [Aspen] was with his father for a week in [location D] and with his mother for a week in the new home in [Auckland].

[24] With respect to this interim arrangement [Aspen] did not go to any school or kura. His educational circumstances as a result came into disarray as a result of the move and the context about who was going to have day-to-day care. Additionally, as well as it being a geographical dispute about where [Aspen] should be schooled the parties had a fundamental disagreement about whether he would be placed in the mainstream school but reasonably likely in a unit where there is a reasonable level of continued emphasis on Te Reo and Kaupapa Māori or whether he should be placed in a kura continuing in his full immersion education. Father proposed a mainstream option perceiving that [Aspen] had become mono cultural in his education which is not what was intended and he had fallen behind with written English which now needs to be remedied. Mother's perspective is that [Aspen] should continue in his immersion education that is important to both she and [Aspen] that this occur. Mother says that [Aspen]'s kura kaupapa education focus on the subject of English as a language from age 11 and any perceived gap in his learning in this regard would then be addressed. Mother says that father's view that [Aspen] is behind with reading and writing in English is only valid if [Aspen] is compared with students who are in mainstream English schooling.

[25] Mother emphasised the need for kura kaupapa schooling for [Aspen] based upon her description of his paternal indigenous roots in Canada (mother's whakapapa's back to first nation people in Canada) and thus relativity of it in Te Ao Māori context. These issues have continued and have been unresolved between the parties and were evident before me in the hearing which I have presided over.

[26] The case was set down urgently for an interim hearing before His Honour Judge D A Blair on 30 June 2021. At the time of the hearing father was in the training phase of his new position and living in [location A] in a rental home. He had purchased a house in [location D] and was due to settle on 14 July 2021. He said to the Court the unconditional date would have been 20 working days prior to settlement. Father anticipated that he would be in his roster properly in August in relation to his new position. Father wanted [Aspen] to remain in his day-to-day care and for an order to record this. He proposed [Aspen] enrol in [School 2] and join the boys leadership class which has as a component of its weekly syllabus several hours of Te Reo Māori. He said that if the Court decided [Aspen] is to be in a kura in the interim his proposal is [a Kura] in [location D].

[27] Mother had recently set up a rental household in [Auckland] with her partner [Jeremy]. The home has five bedrooms and is currently the primary home to [Jeremy]'s two children aged 16 (female) and aged 12 (male). Mother and [Jeremy] have been in a relationship for some eight months. They moved in together [in mid-2021]. Mother is based in a temporary position in the [employment details deleted]. Her partner [Jeremy] is based at the [employment details deleted]. Both of those [places of employment] involved a set rolling roster.

[28] A lawyer was appointed to represent [Aspen] and ascertained his views. The case proceeded before His Honour Judge Blair who also conducted an interview of [Aspen]. He set out in the judgment the child's views. He set out reference to the details of the rotating roster. He made comments and observations. He referred to the schooling issue. He set out the reference to s 5 principles. He made orders of the Court and those orders were for [Aspen] to be in the day-to-day care of his mother with contact to occur every second weekend or two contact weekends per month with details about changeovers. He made orders and conditions. He ordered also pursuant

to s 46R that [Aspen] attend [Te Kura] at [suburb deleted], Auckland until further order of the Court. He made directions as to where the case proceeded thereafter.

[29] The judgment was very significant to both parties. As with any interim judgment it can have a more profound effect than originally intended.

[30] The judgment has been essentially implemented by the parties. [Aspen] has been living in [Auckland] with his mother predominantly. He has contact with his father but that has not worked out as frequently as father hoped. The situation is very complex. Both mother and father are involved in rotating rosters. It is hard enough for a family to work out contact with one of the parents having a rotating roster but where both are involved in a rotating roster it becomes a nightmare. This has been evident since the interim decision was made in July 2021.

[31] It is fair to say that father did not accept the outcome and has expressed unhappiness about the difficulties he has experienced in having regular contact and remains concerned about educational issues. It has taken some time for the case to proceed to a long cause fixture but has now been finally heard before me. Since the judgment of Judge Blair [Aspen] has been attending [Te Kura] at [suburb deleted]. The Court received an updated report which was in Māori but a translation was provided to the Court in English. Father put a lot of store in that report and raised concerns about [Aspen]'s achievement levels particularly in English and some other subjects. Mother has continued to work as [occupation deleted]. Father has continued to work as [employment details deleted].

[32] At the date of hearing both parents confirmed to the Court that they intended to remain in their present locality. Neither indicated an intention to shift. Mother was reluctant to shift to [location D] because of her employment commitments and her commitments to her new partner. Father indicated that he was reluctant to shift from [location D] to [Auckland] because he had acquired property in [location D] and was happy with his employment being based there. Because they live 180km apart it makes it impossible for them to be involved in a shared-care arrangement. It means that practically speaking unless one of them relocates one parent has to have day-to-day and the other every second weekend contact (subject to roster) and for periods of

time in the school term holidays and Christmas holidays. The Court has no jurisdiction to order either of them as an adult to shift. The Court only has jurisdiction over the locality of the child. However, I have framed the orders that I have made in this case to provide the possibility of a relocation should that eventuate with a shared-care arrangement following on. This is to provide an incentive to both parents to try and resolve the locality issue.

Father's case

[33] Summary of the case for father is as follows. Mr Hack in his helpful opening submissions summarised the case for father and I set out paragraphs 20-50 of those submissions as follows:

20. Mr [Gully]'s position is that it would be in [Aspen]'s welfare and best interests to move into his day-to-day care in [location D] and attend [School 3] because it would provide:
 - a. better education opportunities.
 - b. a chance at better social interactions.
 - c. a chance at better physical health outcomes.
 - d. better support of both parents' relationship with [Aspen] and greater involvement in guardianship decision-making.

Education opportunities

21. [Aspen] has attended Māori medium education since preschool. Both parents are supportive of [Aspen] continuing learning in Māori focused schooling. Both acknowledge the importance of the Māori language, worldview, and values in [Aspen]'s identity.
22. Ms [Beaker] seeks that [Aspen] remain in full-immersion Māori schooling, whilst Mr [Gully] believes that a bilingual school would offer better and broader educational opportunities for [Aspen].

Concerns about [Te Kura]

23. Mr [Gully] is concerned that [Aspen] is not achieving well at school. [Aspen]'s most recent school report shows that [Aspen] is at the lowest levels of progress in reading and writing in Te Reo Māori, in all areas of mathematics, and in studies related to the Kingitanga and Kapa Haka.

24. Mr [Gully] deposes that the decline in [Aspen]'s grades could be due to a number of factors, including the quality of his current schooling, the stressors of his home environment, and the issues of identity and connection to those around him.
25. He raises concerns about [Aspen] being potentially the only non-Māori student at a staunchly Māori school and how this may impact [Aspen]'s sense of self and identity. An example of this can be seen in [Aspen] struggling to engage in writing or working on his pepeha and being made to write lines for speaking English.

The benefits of attending [School 3]

26. Mr [Gully] firmly believes that [Aspen]'s needs would be better met at [School 3] in the 'Reo Rua' bilingual unit in which 50-80% of the lessons are conducted in te reo Māori.
27. Mr [Gully] references a Ministry of Education study which concluded that in comparing bilingual and immersion schools, bilingual students achieved approximately 20% higher in literacy and numeracy, 30% higher in te reo Māori, 20% higher in English, and 7% higher in science.
28. In reference to the achievement in science, the report noted that less than 40% of the candidates achieved credits in science, crediting this to a lack of science resources in te reo Māori and difficulty in recruiting science teachers who can teach in an immersion context. This becomes less of an issue in bilingual units as the school can use their mainstream resources to compensate for the lack of reo Māori teachers in that space.
29. Besides the academic benefits, [School 3] has a larger and more diverse roll. This would provide an opportunity for [Aspen] to connect with a broader range of cultures and ideas while having more significant opportunities to connect with a sense of who he is as a non-Māori living in Aotearoa.
30. To give context, [Te Kura] only has 20 students in Years 7 and 8. Whereas [School 3] has a roll of 561 students –

49 per cent of the students are Māori. A breakdown of the roll is included in the following table:

School	Māori	Pacific	Asian	MELAA	Other	Euro	Total
[Te Kura]	20	0	0	0	1	1	20
[School 3]	342	67	29	8	6	342	561

What do the experts say about [Aspen]'s schooling

31. The Cultural Report writer noted that [Aspen] would benefit from remaining in Māori-medium education of Level 1 (81-100% reo Māori), Level 2 (51-80%) or Level 3 (31-50%). Mr [Gully] proposes that [Aspen] attend a Level 2 class, but it should be noted that [School 3] provides all three levels (as well as a beginner level and mainstream schooling).
32. Ms [Beaker]'s expert witness, Professor Stephen May, highlighted the benefits of bilingualism, some common misconceptions, and the importance of [Aspen] remaining in bilingual education.
33. There is no dispute with Professor May's evidence, as Mr [Gully] is not proposing that [Aspen] leave Māori medium education.
34. [Aspen] has spent approximately 7 years in Māori immersion education (not including his preschool education). Mr [Gully] supports [Aspen] in continuing his education in a predominantly Māori environment at a school with a more diverse roll, greater resources and broader education opportunities.

[Aspen]'s views about his current school

35. [Aspen]'s recent comments to Lawyer for Child are that he enjoys going to school, he likes the kids and most of the teachers.
36. This is an improvement, given [Aspen]'s initial comments being:
 - a. [to Lawyer for Child] that school was "alright" and that he did not like the teachers who were too strict, the food was not good, and he sometimes got in trouble. He said his last school (in [location A]) was better than his current school and that he had made a few friends, but hardly anyone was at school.
 - b. [to the Cultural Report writer] that school was "ok" but that "the playground is pretty cool." and that "some of what we learn is pointless, and I can't see the point of why we have to learn it." and that he found the schoolwork boring.
 - c. when the cultural report writer asked [Aspen] who his go-to person at school was, the person he would go to if he had a problem, he stated he would probably talk to his mum when he got home from school.
 - d. he found it was unfair that he was made to write lines for sitting next to boys who were speaking in English.
37. However, [Aspen]'s comments do not account for the fact that his school report shows that he is not doing well in many areas.

Extra-curricular activities

38. Mr [Gully] is worried about [Aspen]'s engagement in activities outside of school. He notes that when [Aspen] was in his care, he did organised [sports], rode his bike and scooter, and engaged in all manner of outdoor activities from bush walks to watersports.
39. Since [Aspen] has been in his mother's care, many of those extra-curricular activities have stopped. When [Aspen] was asked what he enjoyed doing, he responded that he enjoys listening to audiobooks and computer time (which includes gaming), going to the beach, and playing [sport 2].

Socialisation and friendship groups

40. Mr [Gully] raises concerns that [Aspen] does not seem to have a solid friendship group. [Aspen] did not have his first playdate with another student until September 2022. He had had a couple of play dates arranged with a younger girl named [Mila], who subsequently left his school. [Aspen] explained to Mr [Gully] that [Mila] left and that she had been bullied at school for being too white.
41. When the Cultural Report writer asked [Aspen] who his "go-to" person was at school, he responded that he would talk to his mum when he got home from school. [Aspen] related that the "people were nicer" in [location A].¹⁶ Mr [Gully]'s discussions with [Aspen]'s teachers also highlighted concerns that [Aspen] would often spend his lunchtimes playing with younger children.

Encouraging contact with both parents

42. Mr [Gully] raises concerns that Ms [Beaker] has not supported [Aspen]'s contact with him. He notes several instances where Ms [Beaker] has not allowed contact despite [Aspen] only having contact with him for two weekends each month.
43. While there are numerous examples of conflict throughout the evidence, the following demonstrates the conflict surrounding contact:
 - a. Ms [Beaker] did not allow contact for all of September 2021. Mr [Gully] had not had contact for the previous two months due to the Covid-19 restrictions. When the levels changed, Mr [Gully] asked about contact, to which Ms [Beaker] responded, "So we are clear, you give me notice. I plan around it. No notice, no contact. Simple."
 - b. In August 2022, Ms [Beaker] emailed Mr [Gully], "Your priorities no longer lie with our child, and I'll make sure he knows that when he grows up. Once again, you have failed him, and I am sure this will continue to be a recurring theme in his life. Your job and where you live are more important than actually being in his life. Father of the fucking year once more."

- c. Ms [Beaker] blocked contact for September 2022. On 9 September 2022, Ms [Beaker] turned away Mr [Gully]’s partner, [Karen], who had arrived to collect [Aspen] for contact. The contact had been communicated in advance, but Ms [Beaker] stated she had other plans. [Aspen] had waited outside for changeover, but Ms [Beaker] took him back inside. He witnessed [Karen] drive away in tears and later messaged Mr [Gully] to apologise.
44. Mr [Gully] also deposes that Ms [Beaker] has interfered with Facetime calls and has regularly refused to contribute to her portion of the travel for changeover weekends.

Involvement in guardianship decisions

45. Ms [Beaker] vaccinated [Aspen] without agreement and consulted about [Aspen] receiving the COVID-19 booster vaccination. He is concerned that if final orders were to be made placing [Aspen] in Ms [Beaker]’s day-to-day care, he would not be kept up-to-date with the guardianship issues, particularly when there is no oversight from the Court.

Parenting concerns

46. Mr [Gully] has raised concerns about Ms [Beaker]’s parenting style. In particular, he deposes:
- a. In December 2018, Ms [Beaker] took [Aspen] and her new boyfriend on a trip to the South Island. They stayed in her boyfriend's van, and [Aspen] was given sleep medicine without discussing this with Mr [Gully] first.
 - b. In 2022, [Aspen] came into Mr [Gully]’s care on 3 occasions with bruising or describing being bruised. [Aspen] was vague about the bruising but quickly pointed out that it was not his mother’s fault.
 - c. On 31 March 2023, [Aspen] apologised for his mother’s outburst at the changeover. [Aspen] allegedly said, “Actually, it was my fault.” He explained that he argued with his mother before the pickup. 21
 - d. On 4 February 2024, [Aspen] was more worried about his mother’s reaction after we temporarily lost his [pet] during contact. He felt compelled to call his mother instead of searching for the [pet] and felt the need to field his mother’s reaction, including what she felt about Mr [Gully].
47. Mr [Gully] is also worried about [Aspen]'s exposure to his mother’s views around these proceedings. For example, Ms [Beaker] has mischaracterised Mr [Gully] as anti-kaupapa Māori. For instance, she has stated, “It saddens me when I hear [Patrick] speak negatively about [Aspen]’s Māori immersion schooling. His insistence on [Aspen] learning at an English language school is subtly denigrating to Kura Kaupapa and Te Reo Māori ... It angers me that there are still

those who carry racist ideas and think that the best and only way for a child to be successful is if they are taught in the English language.”

48. [Aspen] has made it clear that he does not want to attend a mainstream school, and Mr [Gully] is concerned that [Aspen] has been told that this is what his father is proposing.
49. The evidence shows that [Aspen] continues to be exposed to interparental conflict, particularly surrounding changeovers and contact with his father. [Aspen] is involved enough in the conflict to apologise for his mother’s behaviour and to warn Mr [Gully] when he thinks his mother will be upset with him.
50. Ms [Beaker] has openly told Mr [Gully] that she will tell [Aspen] that his father put his job and location ahead of spending time with him. The evidence shows that Ms [Beaker] regularly blames Mr [Gully] when contact cannot take place. The appears to have been picked up by [Aspen] especially given his comments in Lawyer for Childs report where it notes, “He would like [contact] to be every second weekend, be he understands that because of dads’ work they sometimes can’t happen.”

Mother’s case

[34] Mother’s case in summary is inter-alia as follows. She wants the status quo to remain in place. She contends that [Aspen] is happy and settled. She says her accommodation is stable. She says that it is imperative for [Aspen]’s educational needs particularly for his acquisition of Te Reo Māori be cemented in place and lifelong for him to continue for at least another year, possibly longer in full immersion. She has asked an educational expert to provide evidence to the Court and she has arranged for an affidavit to be filed by Professor Stephen May a professor at the Auckland University Education Department which I will refer to later in this judgment. She relies on his opinion arising from his research into full immersion. She therefore contends for at least another year to two years for [Aspen] to continue at his current school. She says that if he is lagging behind in his English that this will be rectified by the school. He will be taught it as a separate subject and points to the research from Dr May that the evidence is that children from full immersion come out being more proficient in both languages than the average student who learns only one. She then says as [Aspen] can integrate and cope with attending secondary school he could phase in and pursue subjects that he is interested in at [School 4] and as he gets older may end up being there fulltime. She says that she is open to father relocating to [Auckland] and would be open to having a shared-care arrangement if that occurred.

She sees the pathway for [Aspen]'s future to independence has been very clear and that he continues at his current school in full immersion. That as he gets older he integrates and follows through with [School 4]. That he continues with his extra-curricular activities that he is presently involved in. That he continues to have contact with father at least every second weekend. She does not accept that she has sabotaged or not promoted [Aspen]'s relationship with his father. She points to [Aspen]'s views that he wants to remain with her. She says that they have a very special and close bond and she also points to the fact that she has never breached any guardianship obligations and not acted at any stage in a unilateral way. She supports the reasons given by Judge Blair in the interim decision and says that they are still valid. She contends that to shift schools and environments to [location D] where he currently does not know anyone would be detrimental to him. That [Aspen] as a child is affected by change and he would find it very hard to adjust to another school. She points to the fact that [Aspen] had difficulty adjusting from his shift from [location A] and for some time after the shift [Aspen] expressed a clear view that he wanted to return to [location A]. She says that he is now settled in his current school and is a particularly sensitive child and would have difficulty coping with any further change.

[35] She says the current orders are working and there is no good reason to change. She also relies on the cultural aspects and points to the cultural report provided to the Court and that [Aspen] needs to continue in full immersion so that he is exposed to an indigenous worldview which she considers very important. She says that she is a very competent, skilful and intuitive mother and does not accept the criticism about her parenting raised by father.

Issues

[36] The issues that the Court is required to determine are as follows:

- (a) which parent has the day-to-day care of the child and any conditions attached thereto;
- (b) contact for the non-care parent and any conditions;

- (c) which school should [Aspen] attend – s 46R;
- (d) whether he can relocate from [Auckland] to [location D].

Orders of the Court

[37] I am going to set out the orders that I intend to make with the reasons to follow thereafter.

[38] I make the following orders:

- (a) If both parents live within a 10km radius of [Aspen]'s school then he is to be in the shared-care of his parents on a week-about basis with changeovers at 3pm on Friday or earlier if school closes subject to the overseas travel provisions.
- (b) If mother continues to reside [in Auckland] and father in [location D] then the interim orders made by Judge Blair are to become final with the following additions:
 - (i) each parent will provide their roster to the other three days after it is released – not less than six months in advance;
 - (ii) father will identify the weekends he can have contact at least six months in advance;
 - (iii) if a weekend is missed due to non-availability of father for good cause then it is to be replaced by a weekend either immediately following the one that was forfeited or another one by agreement;
 - (iv) the parties are to meet on two occasions per year to discuss advanced weekend availability and to ensure that the ongoing contact is maintained and regarded as a major priority. If however a weekend is missed due to non-availability of father

for good cause then it is to be replaced by a weekend as soon as possible.

[39] These orders are on the condition that father is to ensure he has backup so the child is not left unattended.

Section 46R guardianship dispute

[40] I order [Aspen] to remain at [Te Kura] for 2024.

[41] I direct the parties to enter into discussions with a mediator on the issue of how he is to be educated from Year 9-13. In the event of failure to reach agreement about that I reserve the option of the Court to refer the parties for a s 46G counselling.

[42] I will case manage this case and direct a hearing before me for half a day by submissions only prior to the school being chosen for 2025. If the parents as guardians cannot resolve the secondary schooling issue I would take account of the evidence given at the long cause fixture as well as any updated evidence.

[43] I make the orders for the following reasons:

- (a) whilst there is some evidence from the school report that [Aspen] is not achieving, it is at a level that the risks of change to a new school outweigh any benefit;
- (b) I accept Professor May's evidence that to connect and maintain his Te Reo he has to complete a further year in full immersion.

[44] I accept the parents' joint decision when together to enrol in Kohanga Reo and kura Kaupapa. Having made that decision they need to continue with the decision in their son's best interests. There is no evidence to justify a change.

[45] It is clear both parents love their son. They have both faced difficult dilemmas. Mother chose to re-train as [occupation deleted]. She is employed by [employment details deleted]. She had to re-train in order to support herself and her family. That

meant leaving [location A] and [Aspen] in the care of his father. As a result she did not have day-to-day care of [Aspen] for about 18 months. She found this very painful. Father could not obtain employment as [occupation deleted] whilst in [location A]. He chose to accept a job in [location D] and sought to take [Aspen] with him. This triggered the without notice applications subsequently requiring an interim hearing before Judge Blair who ordered the child back to mother's day-to-day care. Father has experienced a lot of pain in not having day-to-day care. How they have handled that pain is different. Father has sought legal assistance for [Aspen] to be returned to his day-to-day care. He has made some serious allegations against mother. It is clear that he is very intense. He is conflicted. He has sworn nine affidavits, some of which are voluminous. There is an obsessive element to the affidavits. He regards himself as a better parent than mother and says that she is a risk to the child. There is no independent evidence which supports that. Mother feels under scrutiny and under attack. She has reacted at times and inappropriately. There is no cooperation. There is no communication between them as parents. The child picks up the tension between them. He does not see any cooperation as guardians.

[46] The school reports report a happy child and he tells his lawyer that he is happy with the school. He expresses a view to remain with mother. Father proposes a change of day-to-day care and for him to be enrolled in [School 3] and then subsequently [School 5]. Mother proposes him remaining at his present school and then subsequently integrating into [School 4] as he gets older and more able to cope with the larger school. Mother says she cannot relocate to [location D]. She has a position as a professional [occupation deleted]. Similarly, father says that he cannot relocate having his job at [details deleted]. That means that with them 180km any shared-care arrangement is impossible to work. This is especially so when both of them are involved in rotating rosters. It makes the orders made in reality by Judge Blair as the only realistic option that was possible.

[47] The case for father that mother is dysfunctional and a risk to the child is influenced by his strongly-held negative adult view that the child should remain in his day-to-day care. He clearly does not accept the decision that was made by Judge Blair. Mother has a functioning job and seems to be maintaining relationships with her family and friends. The evidence does not support need for a change.

[48] I accept the opinion of Professor May. I find that [Aspen] is in need to remain in full immersion for at least another year to cement in place his language in order to fulfil the agreement made by the parents as guardians when he was originally enrolled in Kohanga Reo and kura kaupapa.

[49] [Aspen] is a child that does not handle change very well. Both parents accepted that he wanted to return to [location A] for a long time after he shifted. There is a risk to his well-being if he shifts.

[50] Father has put a lot of reliance on his school reports. He has argued that the school is not meeting [Aspen]'s educational needs. I have no independent evidence to establish that. Neither parent is an expert in education. I find there are risks if he was to change his school. He is settled at present and making progress. If one or both parents are unhappy with his academic progress there are solutions such as engaging tutors who may help him and give him one on one lessons to improve any particular subject. It is clear that [Aspen] is doing well in the care of his mother. I have not found any good concrete reason to warrant changing the interim order by Judge Blair.

[51] Dealing with each of the arguments father has advanced as follows. Father has raised issues about the quality of education that [Aspen] is receiving at his current school. The primary basis for that contention is the last school report. Whilst it does show that several subjects are at the lowest level I have no independent expert evidence to establish that it is the school's responsibility for those marks or whether there is some other explanation for that. It is clear having met [Aspen] and based on the information from his lawyer in her reports that [Aspen] has been exposed to conflict between his parents that could be a reason for poor school performance and without assistance from an expert psychologist it is very difficult to determine. I am not in a position to make a finding that the school he attends is responsible for any poor performance. He appears to be happy at school and progressing. Father contends that [Aspen]'s needs will be better met at [School 3]. It is clearly a much larger school and there is a significant class size difference between the two. There will also be a change from full immersion where he presently is to a bilingual unit in which 50-80% of the lessons are conducted in Te Reo Māori. There would be quite a change for him. I accept there may be some advantages going to a bigger school but I am also

concerned that [Aspen] is a child that does not cope with change very much. I am satisfied that there is a risk that the benefits of change will be outweighed by the consequences and impact on [Aspen]. [Te Kura] only has 20 students in Year 7 and 8 whereas [School 3] has a role of 561 students – 49% of the students are Māori. The cultural report writer Ms Griffiths noted that [Aspen] would benefit from remaining in Māori medium education of Level 1 (81-100% Te Reo Māori) Level 2 (51-80%) or Level 3 (31-50%). Father proposes that [Aspen] attend Level 2 class but it should be noted that [School 3] provides all three levels (as well as beginner level and mainstream schooling).

[52] Ms [Beaker]’s expert witness Professor Stephen May highlighted the benefits of bilingualism, some common misconceptions and the importance of [Aspen] remaining in bilingual education. Father does not dispute Professor May’s evidence. Father is not proposing that [Aspen] leave Māori medium education. He would like to change the emphasis so that he is exposed to English. He is concerned about the level that he is reaching in English at his current school. He argues that the school with more diverse role, greater resources and broader education opportunities will be a benefit. That may be the case but I have to weigh that up against the possible detriment and consequences for [Aspen] of the change. [Aspen] expresses a view through his lawyer and also to me that he likes kids at his school and most of the teachers.

[53] I accept that when first interviewed by Ms de Luen following the recent change he was more negative about [Te Kura] but this has changed in the most recent report and I think this is reflective of how long it took him to come to terms with the change and to adjust to it. I consider that he is a child who does not cope with change and the Care of Children Act requires me to look at [Aspen] in his individual circumstances. I think there are remedies available for the parents if they wish to upskill him in English then they would be engaging a private tutor. I think that is a better option of addressing the educational deficits than a change of school.

Extra-curricular activities

[54] [Aspen] has told his lawyer and me that he wants to pursue [sport 1] and is intending to enrol in the club this year. That he is very keen on [sport 2] and tells me that he is very good at it and he is also interested in [sport 3]. He also rides his bike and plays [sport 4]. He likes being in nature. One of the consequences of the parties' remaining at a significant distance apart is that it makes it very difficult for both parents to be involved in extra-curricular activities particularly on a Saturday morning which means that if he enrolls in a team sports such as [sport 1] he may have to miss every second game because it will be impossible for his father to get him back to [Auckland] or wherever else he is playing [sport 1]. Because at his age the grounds will shift around and he will have a home and away situation which could involve a lot of travelling. This requires parental support. The question arises whether it is better to spend time with his father than play [sport 1]. This is going to be a difficult dilemma to resolve. [Aspen] was very positive about the extra-curricular activities that he is presently involved in.

Socialisation and friendships

[55] Father is concerned that [Aspen] does not have a solid friendship group. This may be more of a function on his ability to socialise than anything to do with mother or the school that he attends. I have no evidence that this will improve if there is a change of school.

Encouraging contact with both parents

[56] Father presents a case that when the child was with him he facilitated and maintained contact with mother. He says this has not occurred when in reverse and considers that mother has not facilitated and promoted his relationship with [Aspen]. I do not accept that mother has sabotaged the contact. I know this was raised by Ms de Luen as a concern in her final submissions. I think the logistical issues that have arisen in this case have caused a lot of the gaps and missing of contact with the two rosters operating, meaning that the window of opportunity to have [Aspen] has been impacted. I think the lack of contact has arisen more due to the lack of

communication between the parents rather than mother deliberately sabotaging the contact. I fully accept that it has caused a lot of frustration to father and this has to be rectified. I have considered that a possible remedy for this is to appoint a communication assistant who can act as a go between the parents to improve their communication and to ensure that it remains rationale and productive. I therefore direct as a condition of any parenting order that both parents engage a communication assistant such as a psychologist or counsellor who can act as a go between when they are setting contact dates and any need to change if they need to be flexible. The cost of engaging a communication assistant will need to be borne equally between them. I request that they put their heads together and see if they can agree on a person who could undertake that role. If they fail to agree in the next 21 days the Court will appoint someone. I am satisfied on the evidence before me that the impasse relating to contact and the missing of dates arises primarily out of poor communication rather than one parent being responsible for it but it is imperative that this improves and the contact becomes more regular.

Parenting concerns

[57] Father raises concerns about mother's parenting style. He has raised issues in his affidavit and considers that if he had day-to-day care such issues would not arise. I cannot accept that because when he had day-to-day care he unilaterally sought to relocate to [location D]. He therefore demonstrated by that action that he also has issues with respect to his parenting style and capacity. I consider that both parents behaviour at times has been less than optimal. I ask them to reflect on that situation to ensure that it improves for the future. I am satisfied that both parents have expressed frustration at times and have exposed [Aspen] to the conflict. On the evidence before me I was not able to discern that one parent was more responsible than the other. Both their conducts at times have fallen below standard.

Section 5 principles

[58] Section 5(a) states that [Aspen] must be protected from all forms of violence. This includes the psychological violence he is exposed when he experiences the conflict between his parents. It is imperative that this stops. Safety issues do not require either of his parents to have supervised contact but in terms of his long-term welfare the dynamics between his parents must improve.

[59] Section 5(b) requires that [Aspen]'s care, development and upbringing be primarily the responsibility of his parents. There is no dispute about this and this does not assist me in making a decision in this case. Both parents accept that they are responsible for the care of [Aspen].

[60] Section 5(c) requires [Aspen]'s care, development and upbringing to be facilitated by consultation and cooperation. A notable feature in this case is the lack of communication between the parents and the ongoing conflict. For this reason I have made a direction to have a communication assistant appointed by both parents to assist them in communicating.

[61] Section 5(d) requires continuity, development and upbringing of [Aspen]. This principle does not assist me in making a decision in this case. I accept that there needs to be continuity but what I have to do is weigh up the two proposals put forward to Court and determine what is in the best interests and welfare of [Aspen].

[62] Section 5(e) emphasises the importance of continuing relationships with parents, whanau and family. I consider a shared-care arrangement would be the best outcome for [Aspen] but this requires the parents to be in close proximity to each other and near [Aspen]'s school. For this reason I have put the orders in the alternative and have a shared-care arrangement to take place in the event of one of the parents relocating. As the Court has no jurisdiction over them as adults I direct that to occur but would like to encourage that outcome. Otherwise there is no dispute between the parents that [Aspen] should maintain relationships with his whanau.

[63] Section 5(f) reinforces the importance of preserving and strengthening [Aspen]’s identity. I was pleased to see that there was no dispute between the parents on the every important guardianship issue that he continues in his journey of becoming fluent in Te Reo Māori. There was no dispute about how that be an option but the dispute is how that is best to occur. Mother argues that immersion at [Te Kura] is the only way to support [Aspen]’s indigenous worldview. Mr Hack argues that such a statement has no basis and also minimises the lived experience of the majority of Māori who attend kura kaupapa Māori. That the Māori worldview is unique and it does share some similarities with many other indigenous cultures and is not interchangeable. Whilst I acknowledge those competing objectives I do not consider I need to make a decision about how that is seen. The reality in this case is that there is agreement between parents that he continues in his learning of the language and there is a debate about how that is best achieved. Luckily the Court has the assistance of Professor May who is a world leading expert to assist in determining what is the best way forward.

Professor May’s evidence

[64] Professor May’s evidence in summary says as follows. Dr Stephen May provided an affidavit to the Court. He set out his background expertise and experience. There was no challenge to the fact that he is an expert in the area of bilingual/immersion education in Aotearoa New Zealand. He outlined his key appointments. He set out the brief from Ms [Beaker] provided to him. He defined key terms that he was going to use in his affidavit. He set out misperceptions about bilingualism and bilingual education. In paragraph 13 of his affidavit he said as follows:

...it is clear from research on bilingualism and bilingual/immersion education programmes that learning a new language does not automatically result in the loss of the other language; there is no “balance scales” (more of one; and less of the other) effect. In fact there is now more than 200 major research studies that broadly conclude that when children continue to develop their abilities in two or more languages throughout their primary school years, via bilingual education, they gain a deeper understanding of language and how to use it effectively. “This is because skills and knowledge are acquired in one language can be readily transferred to another, indicating in turn a link between the two languages in the mind and the notion of cognitive overload is simply wrong”

[65] He set out further details with respect to the common underlying proficiency model/iceberg analogy. He set out the advantages of (additive) bilingualism, the effectiveness of emergent education. He attached some findings from research to his affidavit and set out key implications for students in Māori medium Level 1 school programmes. He concluded in paragraph 30 as follows:

In some, the best means of achieving successful bilingualism, biliteracy and broader academic achievement is to remain in an emergent programme, such as Level 1 Māori medium education, for 8 years, if possible.

[66] Professor May was made available for cross-examination and answered comprehensive questions put to him. He reiterated the conclusions set out in his affidavit and expanded upon them. One of the conclusions stated:¹

So one of the other things around the research is, for example, bilingualism and multilingualism mitigates to dementia because of the integration of knowledge and the multiple use of languages, so it's the opposite rather than a cognitive loading.

[67] He reiterated the benefit to [Aspen] of being in full immersion for 8 years and advocated that he continue at his current school for the balance of 2024. He was asked a question by Ms [Beaker] as follows:²

- Q. Mr [Gully] has expressed some – throughout his affidavits some concerns that kura kaupapa Māori won't adequately prepare him for the world. He would be left a bit monocultural, that it will have a negative effect on [Aspen]. Are you able to speak to that a little bit? Are you able to suppose from the search, what does the research say?
- A. So going back to the research over the last, as I said 1960sm what we know is that bilingualism in any combination of languages as those advantages that I mentioned earlier. So irrespective of the languages involved if you're in a bilingual context then those advantages ensue.

[68] He expanded on what is happening in the New Zealand context.

¹ Page 145 NOE line 25.

² Page 150 NOE line 6.

[69] There is no expert evidence to contradict what Professor May had said to the Court. I fully accept his expert opinion. In explanation I am satisfied that it provides a very strong reason for [Aspen] to complete Year 8 at his current school because it provides a full immersion context and I am concerned that changing schools will damage his learning. Accordingly I find that [Aspen] should remain in the day to day care of his mother and remain at his current school. I've set up a process for the parents as guardians should confer and decide on his secondary school so this judgment is confined to the balance of 2024. The issue of 2025 and beyond should be the subject of consultation as required by the Act.

Judge DA Burns

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 28/03/2024