



## **Introduction**

[1] LH appeals against orders made in the Family Court at Auckland, admonishing her for three contraventions of parenting orders and directing her to pay costs to her former husband, the respondent, FD.

[2] The appeal raises questions about the interpretation of the enforcement regime, including the power to admonish, introduced by the Care of Children Act 2004 which has not previously been considered in this Court. Accordingly, it was appropriate to reserve judgment following the conclusion of oral argument, in order to review carefully the relevant provisions and their application to these facts.

## **Background**

[3] LH and FD were briefly married in 2004 before separating. Their daughter, M, was born in 2003. Each had children from previous marriages. LH's two children were aged 22 and 16 when the application to admonish was heard; both suffer from serious health problems. FD's other two children were then aged 15 and 12 years.

[4] LH left New Zealand with M in December 2007 to visit her ill father in the United Kingdom. A dispute arose about whether FD had consented to M departing the jurisdiction. He attempted to invoke the enforcement provisions of the Hague Convention before LH returned to New Zealand with M in August 2008.

[5] This event was not directly material to Judge Burns' decision to admonish. But its occurrence provides important context. The Judge noted FD's perception that LH's conduct in removing the child from the jurisdiction and subsequently was designed to alienate M from him; on the other side of the ledger, he noted LH's allegations of FD's violence towards her and drug abuse. The consequences of the United Kingdom visit, and the later litigation in the Family Court, manifest a deeply dysfunctional relationship between LH and FD and a corrosive and resource wasting inability to settle arrangements about FD's contact with M.

[6] FD applied to the Family Court for parenting orders immediately following M's return to New Zealand in August 2008. His purpose was to re-establish contact with his daughter. Judge de Jong heard the application on 30 January 2009. By then FD had had supervised contact with M on at least six occasions. The parents apparently agreed that this arrangement should continue weekly for the next six weeks, graduating to unsupervised contact for longer periods thereafter.

[7] Judge de Jong made interim orders placing M in her mother's day-to-day care with contact in favour of FD on a supervised basis at Care for Kids each Saturday between 2 and 4 pm for the following six weeks; on an unsupervised basis for the following six weeks from 9 am to 1 pm each Saturday; and on an unsupervised basis thereafter from 9 am to 5 pm each Saturday. The Judge imposed a condition that the parents attend a parenting through separation course and directed FD to supply a hair follicle test for the purpose of drug analysis, the cost to be borne equally by the parties.

[8] Even though she had effectively consented to the parenting orders, LH nevertheless applied without notice to the Family Court on 13 March to suspend the unsupervised contact order. Judge McHardy issued a minute that day varying the order, stating:

It would appear that it was Judge de Jong's intention that the completion of the hair follicle testing would be a condition precedent to unsupervised contact commencing. Accordingly I am satisfied that the order should be partially suspended in that regard. There is to be a continuation of the supervised contact until the hair follicle testing [is] completed satisfactorily.

[9] FD responded with a without notice application on 25 March to vary the varied interim parenting order, which was granted by Judge McHardy in these terms:

The varied orders are accordingly varied further to contain a further condition that unsupervised contact shall commence upon receipt of ESR test results showing [FD's] test is clear of amphetamines and opiates.

[10] LH's three alleged contraventions of the contact order followed thereafter. The scheduled first full day of unsupervised contact was 23 May. But contact did not occur. LH failed to deliver M to the changeover point. A Care for Kids

employee advised FD that M had "an upset stomach" but no further information was given.

[11] LH then applied on 27 May without notice to vary the parenting order. Her purpose was to reinstate the regime of supervised contact. I will return to this event.

[12] Contact did not occur as ordered on 30 May and 13 June. Both Ms Soljan for FD and Mr Ashmore as lawyer for the child wrote to Ms Macnab for LH in the interim, complaining about the latter's apparent contraventions of the contact order and, significantly, placing her on notice that an application for enforcement would be made. Again I will return to this correspondence.

[13] FD filed applications on 17 June (1) on notice for admonishment and costs orders and (2) without notice for a warrant to lie in Court to secure compliance with the parenting orders for the ensuing weekend. LH responded by filing an application on 19 June to set aside the warrant and vary the parenting order on the ground that M was unwell. She was said to be suffering from an unspecified "communicable disease".

[14] Judge Fleming delivered an urgent decision on LH's application on 23 June. The Judge expressed reservations about the value of medical certificates tendered by LH relating to M's ill health. However, despite other misgivings, the Judge was not prepared to issue a warrant to enforce unsupervised contact. Instead, she varied the existing order to provide for contact to revert to a supervised status, at least until a psychologist's report was available (a full report was prepared under s 133 on 16 November 2009).

[15] Judge Burns heard the substantive application for admonishment and costs orders on 9 July. His reserved decision was delivered on 14 September 2009.

### **Statutory Provisions**

[16] As noted, the power to make an admonishment order was introduced by the Care of Children Act 2004 (all future statutory references are to that enactment).

The power appears in Part 2 (Guardianship and Care of Children), sub-part 2 (Care of Children: making arrangements and resolving disputes), under a set of provisions (ss 63-77) headed "Making Parenting Orders Work". The introductory provision explains that the relevant statutory provisions are designed to provide to the Court and to the parties to a parenting order "a range of options for making an order work": s 63(1). As Ms Macnab emphasises, in determining whether to make an admonishment order the Judge: s 64(1):

... must (as required by s 4) consider whether the order or other response would serve the welfare and best interests of the child who is the subject of the parenting order concerned.

[17] The power to make an order is expressed in these terms: s 68(1):

On an application for the purpose by a party to a parenting order, the Court may, if satisfied that another party to the order has contravened the order, do any of the following:

- (a) admonish the party who has contravened the order:
- (b) vary or discharge the parenting order under section 56 (for example, by reducing the time during which the child is in the care of, or has contact with, the party who has contravened the order).

[18] Interpretation of s 68 does not raise any jurisprudential difficulties or complexities. It is a model of simplicity. Its purpose is obvious. The power to admonish is to administer a warning or reprimand. It is a mark of the Family Court's disapproval, which is designed to act as both a deterrent and an incentive. It also constitutes a formal record of a party's previous misconduct in the event of recurring disputes about compliance with parenting orders.

[19] When considering an application for an admonishment order the Court must follow a two-stage inquiry to determine whether: (1) one party has contravened a parenting order; and, if so, (2) an admonishment order should be made. The first or jurisdictional stage of the inquiry requires proof of the fact of contravention. Contravention occurs when the parent responsible for providing contact fails to satisfy or breaches his or her obligation according to the order. The duty of compliance is strict. Issues of excuse or explanation fall for consideration at the second or discretionary stage of the inquiry. In addition to the mandatory factor of the child's welfare and best interests, the Court will take account of what

Mr Ashmore correctly calls moral culpability, addressing such factors as responsibility for the contravention and whether it was deliberate or beyond a party's control.

[20] The Act separately provides: s 78(1):

Every person commits an offence and is liable on summary conviction to the penalty stated in subsection (2) who, without reasonable excuse and with intent to prevent a parenting order from being complied with, contravenes, or prevents compliance with, the parenting order.

[21] These new provisions were enacted to counter a degree of discontent about the difficulties associated with ensuring compliance with Family Court orders. The Chief Family Court Judge, Judge Peter Boshier, noted in an address given in 2004 that:

Recent developments ... have shown that the balance currently sits too far in favour of those who resist court orders.

[22] However, admonishment, as Ms Soljan emphasises, is at the bottom of the hierarchy of possible interventions. Included among the others, in an ascending scale of severity, are powers to levy a bond (s 70), to impose costs (s 71) and to issue a warrant of enforcement (ss 72 & 73). A punitive element is common to these other interventions, involving as they do a power to impose a financial penalty or allow physical interference by the state.

## **Appeal**

[23] While Ms Macnab's arguments were of a general nature, and Judge Burns decision was not based upon this distinction, it is appropriate to consider the appeal according to the two-stage inquiry mandated by s 68(1).

### *(1) Jurisdiction*

[24] Judge Burns was satisfied that the orders made earlier by Judge de Jong were "crystal clear". He proceeded on the premise of LD's contravention, moving immediately to other issues which properly fall within the scope of discretion.

[25] The terms of the order made on 30 January 2009 were unequivocal. The subsequent variations were restricted to the nature of the contact, not its existence. The interim contact order operative when the contraventions occurred provided for FD's unsupervised contact with M on each of the three days between 9 am and 1 pm. Compliance required LH, who had day to day care of M pursuant to the same order, to bring her physically to Care for Kids, the changeover location agreed by the parties.

[26] Ms Macnab did not directly address jurisdiction. When pressed, she accepted that contact did not occur on any of the three dates. However, she maintained a challenge to the contravention finding by resorting to arguments of explanation or excuse which properly fall for consideration at the discretionary stage. In legal terms, Ms Macnab's principal argument is that the orders were subject to an implied term that, as the parties had agreed contact was to occur through Care for Kids, they were bound by its rules which operated on each occasion to frustrate contact. She refers to Care for Kids' policy of refusing to accept a child who may have had an infectious illness, which she asserts was implemented throughout because M was suffering from diarrhoea. Accordingly, she submits, LH did not contravene the parenting order.

[27] This submission, which also falls into the discretionary category, does not require legal analysis. The argument must fail on the facts. Ms Macnab produced a letter from the Care for Kids Service Co-ordinator dated 29 June 2009. The letter recited the centre's policy of refusing entry to its kindergarten during weekends to anybody suffering from an infectious illness unless they have been clear of symptoms for 48 hours. However, it then stated:

I acknowledge that you have reported many times on your arrival at this centre that [M] had suffered a bout of diarrhoea that morning and that you had not kept her at home because you were worried about any repercussions at not attending for contact. I further acknowledge that Care for Kids accepted [M] into the centre for changeover on those days.

[28] The Care for Kids letter contradicts rather than supports Ms Macnab's argument. It confirms the centre's practice of accepting M for contact changeover throughout the preceding period, even when she was reportedly suffering from an

infectious illness. It is not evidence that the centre physically rejected M on any of the three days on the grounds of breach of its rules. Moreover, LH's excuse for not providing contact on 30 May was that she, not M, was unwell.

[29] This argument must fail. There can be no doubt that LH contravened or breached the contact order by failing to arrange for M's presence at the changeover point on each of the three days. The Court had a proper jurisdictional basis for applying s 68.

(2) *Discretion*

[30] While Judge Burns did not expressly address the question of discretion, he specifically took into account three broad factors: (1) LH's unilateral action in suspending contact; (2) her failure to apply to vary the orders; and (3) the existence of a pattern of breach. In essence, the Judge gave most weight to LH's pattern to contraventions of her strict duty to comply with the letter and spirit of the contact order unless or until it was varied.

[31] Judge Burns correctly rejected Ms Macnab's argument, which was repeated on appeal, that the existence of a medical certificate to the effect that M was unwell on a contact day was sufficient to justify breach. As already noted, LH's obligation to comply with the parenting orders was strict. A medical certificate, based upon LH's hearsay narration of symptoms of ill health allegedly manifested by M, has no evidential value in this context. Moreover, as Ms Soljan points out, the only direct medical evidence was from a doctor who saw M on 13 June 2009 after the first two contraventions had already occurred.

[32] However, Ms Macnab is on stronger ground in submitting that Judge Burns failed to take into account the mandatory consideration of whether an admonishment order would serve M's welfare and best interests. Ms Soljan accepts that the Judge did not expressly consider this issue. But she says that his concern about the effect on M of repeated failures of contact is implicit in the decision. She refers to an absence of evidence to suggest that M's welfare would be adversely affected by an admonishment.

[33] In my judgment Ms Soljan's argument is insufficient to meet Ms Macnab's submission, especially where the statute identifies the child's welfare and best interests as the only mandatory factor for discretionary consideration. Thus, in accordance with settled principles, I must review the question of discretion afresh.

[34] Mr Ashmore has provided neutral but informative submissions on this point. He notes an unusual element of the order. It did not represent admonishment for non-compliance with an order then in existence but rather for non-compliance with an order which had, by the time of hearing, been varied, rendering the contravention of historic significance. He warns against the risk of conflating the separate issues of whether the originating contact order was in the child's best interests and whether LH should be admonished for her conduct; and against adopting a generalised approach that compliance with Court orders is of itself in the child's best interests.

[35] Ms Macnab submits there is no presumption that, because the Court has decided that a contact order is in a child's best interests, an enforcement or admonishment order will necessarily have the same effect. Instead, the Court must consider the paramount principle afresh in considering whether to make one of the orders set out at ss 63-77. In particular, she says, the question must be whether anything is to be gained, from the child's viewpoint, by admonishment where LH accepts that contact is in the child's best interests.

[36] At this point I note Ms Macnab's submission that Mr Ashmore was remiss in failing to seek M's views on the issue. The proposition that the lawyer for the child should explore with his six year old client the merits of the Court taking the step of admonishing a parent for contravention of an order made for her benefit only has to be stated to be rejected. Furthermore, as Mr Ashmore points out, adoption of that course would compound the harm already caused to M by the effect of her parents' dispute. Fortunately, there is no evidence to suggest that LH has ever discussed the issue with M.

[37] I have given this mandatory factor careful consideration. While of course the best interests and welfare of the child are paramount when determining an

application for parenting orders, it is not so readily apparent why that requirement should occupy the same status on an application for admonishment.

[38] In my judgment the question must be approached in this way. The Court's originating order reflected the parents' consensus, importantly sanctioned by Judge de Jong, that it was in M's best interests for FD to have regular contact with her, graduating from unsupervised to supervised; and that an order was necessary to ensure compliance. Its purpose was to enable the child to re-establish and develop a bond with her father. Continuity and certainty were particularly important for M given preceding events and the overriding dysfunctionality of her parents relationship.

[39] LH's conduct amounted to a serious, sustained and unsanctioned interruption of the underlying arrangements. As Judge Burns found, it constituted a deliberate pattern of contravention of a Court order. It was contrary to M's best interests for either LH or FD to unilaterally frustrate or change the order, without the Court's sanction, because that conduct would only compound parental discord, which would inevitably manifest itself in the parents dealings with M, and disrupt a regime of contact which had been settled for her benefit. I am satisfied that a formal reprimand was an appropriate response to deter its repetition, or in statutory terms to make the contact order work. Admonishment would also reiterate to LH her obligation to seek the assistance and sanction of the Courts, rather than pursue her own unilateral actions, in order to address whatever concerns she may have with the legal arrangements for M's care and contact. Also, as Mr Ashmore points out, a decision to enforce an order by admonishment would not adversely affect M's welfare.

[40] It is inconsequential, I think, that LH had secured a return to the status quo of supervised contact by the time of hearing. The power of admonishment is not dictated by the nature of the parenting order. It is directed towards the more important issue, from M's perspective, that a substantial contravention has occurred. It cannot be raised by way of justification that the reason for LH's unilateral intervention has since been validated, especially where it was of an interim and qualified nature. A much more fundamental question of principle and policy arises.

[41] That conclusion would be sufficient to dispose of the appeal. However, I must address Ms Macnab's other principal submission that Judge Burns erred in giving particular weight to an erroneous factor; namely, that LH had acted unilaterally without applying to suspend or vary the parenting order. Ms Macnab points out correctly that on 27 May, four days after LH's first contravention, she filed an application ex parte for variation on LH's behalf. But what happened, or did not happen, subsequently assumes decisive relevance.

[42] Judge Coyle issued a minute immediately upon receipt of LH's application. He directed that it was to proceed on notice and abridged time to 14 days. He also directed appointment of a lawyer for the child to report within the same time on a specific brief. However, no steps were taken to arrange service and Ms Macnab did not communicate either with Mr Ashmore or Ms Soljan after 27 May.

[43] Ms Soljan wrote to Ms Macnab on 4 June to record LH's contravention of the contact orders on 23 and 30 May. This letter, and all subsequent correspondence, was faxed. Ms Soljan sought Ms Macnab's confirmation that M would be made available for contact the following Saturday. Ms Emma Parsons (then acting as lawyer for the child in Mr Ashmore's absence) wrote to Ms Macnab the following day, having received Ms Soljan's letter. She specifically repeated her verbal advice to Ms Macnab that LH ran the risk of admonishment and issue of an enforcement warrant if she continued to breach the contact order. Ms Parsons also recorded her understanding from Ms Macnab that LH had filed or was about to file an application to vary the parenting orders. She confirmed that she had not been served or notified of a date and sought advice about whether proceedings had in fact been filed and whether service copies were available.

[44] Ms Soljan wrote to Ms Macnab again on 10 June to record that, while LH had taken M for contact on 6 June, it was only for half a day and not the full day as ordered. She expressly placed Ms Macnab on notice that FD would apply for enforcement orders including an application for admonishment and costs if there was another breach.

[45] Ms Macnab responded by letter the next day, 11 June, to both Ms Soljan and Mr Ashmore. She opened by asserting that LH had not breached any orders, asserting incorrectly that M's inability to attend contact due to sickness is "a full response". The balance of her letter was directed towards justifying LH's conduct. She was silent about the application to vary which had been filed on 27 May. The tone of Ms Macnab's correspondence was dismissive and discursive in circumstances which plainly called for a constructive and conciliatory response.

[46] Ms Soljan wrote again on 12 June. She placed Ms Macnab on direct notice that FD required contact in accordance with the order the next day. Contact did not occur. FD applied without notice for a warrant on 17 June. Judge Burns granted the application subject to a direction that it lie in Court for a fixed period. FD also applied for admonishment and costs orders. LH applied to vary on 19 June.

[47] Ms Macnab's failure to pursue LH's initiating application for variation, and the terms of her correspondence, left FD with no choice but to apply for enforcement orders. FD's counsel, and lawyer for the child, had taken firm but courteous steps to seek LH's compliance without resorting to further litigation. Ms Macnab did not reciprocate in the same spirit. I must assume that she acted throughout on LH's instructions. But the result, which was detrimental to the interests of all parties, could and should have been avoided.

[48] I am satisfied that the admonishment order was in M's best interests and that Judge Burns placed appropriate weight upon the nature and extent of LH's breaches. LH's appeal is dismissed.

### **Costs**

[49] LH separately appeals against Judge Burns' award of costs in FD's favour of \$1,500. Ms Macnab submits that the Judge should have considered the negative impact of an award on M and taken account of LH's financial circumstances. However, I am in no doubt that the Judge properly exercised his discretion in directing that in this case costs should follow the event. That appeal is dismissed.

[50] Ms Soljan seeks costs on the appeal. I have considered this submission carefully. However, LH is legally aided and I am not prepared to make an order pursuant to s 41 Legal Services Act. Even though I am satisfied that this appeal should not have been brought, and legal aid should not have been granted, I am not satisfied that the case reaches the s 41 threshold.

[51] I would add, however, my expectation that the Legal Services Agency will consider very carefully any further applications for legal aid to fund the type of interlocutory activity which occurred between these parties in the Family Court from March 2009 onwards. It is inappropriate that the state should continue to bear the financial responsibility for the parties' chronic inability to put aside their personal differences and act co-operatively in their daughter's best interests. I direct the registry to send a copy of this decision to the Legal Services Agency.

[52] There will be no order for costs in this Court.

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Rhys Harrison J