

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOV.T.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS](http://www.justice.govt.nz/courts/family-court/legislation/restrictions-on-publications).

**IN THE FAMILY COURT
AT HAMILTON**

**FAM-2015-019-000153
[2016] NZFC 4092**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	JAMES FORD Applicant
AND	TESSA EVANS Respondent

Hearing: 27, 28, 29 April 2016

Appearances: P Sullivan for the Applicant
R Senar for the Respondent
M Earl agent for T Gunn as Lawyer for child

Judgment: 02 June 2016 at 11:00 am

**RESERVED JUDGMENT OF JUDGE G S COLLIN
[Care of Children Act 2004]**

Introduction

Kaia Evans is now aged four. Because of an allegation that she was sexually abused by her father James Ford, Kaia has not seen him since March 2014. Kaia's mother Tessa Evans opposes Mr Ford having any contact. Ms Evans believes that Kaia will never be safe in Mr Ford's care and thinks that Kaia should not have to "confront her sexual abuser again". This case is about what, if any, contact Kaia should have with her father.

Issues for determination

[1] The issues for the determination by the Court are:

- (a) Was Kaia sexually abused by Mr Ford;
- (b) Should Mr Ford have contact with Kaia;
- (c) If so how should that contact occur?

[2] There is no issue regarding the day to day care of Kaia, who is to be with Ms Evans.

Kaia's views

[3] Section 6 of the Care of Children Act requires that Kaia be given a reasonable opportunity to express her views on matters that affect her and that any views expressed must be taken into account in the making of Court orders.

[4] Kaia's lawyer is Ms Gunn who filed a report dated 15 April 2016. Ms Gunn visited Kaia at the home of her mother but because of the issues and Kaia's age she did not formally interview her. During the course of the hearing Kaia was represented by Mr Earl.

[5] A s 133 report was completed by Ms Cathy Orr, a registered clinical psychologist and an experienced Court report writer. Ms Orr met Kaia at the home

of Ms Evans but was unable to observe her with Mr Ford. Ms Orr did not seek to ascertain Kaia's views and no views were expressed by Kaia to her.

[6] Kaia was not judicially interviewed because of:

- (a) Her age;
- (b) The issues involved;
- (c) My assessment that any views expressed would carry very limited weight because:
 - (a) Kaia had not seen her father for over two years and it is unlikely that she would have any memory of him;
 - (b) Any memory that she does have is likely to have been influenced by the views of other adults with whom she has regular contact;
 - (c) Kaia's own views are unlikely to have any influence on the final outcome.
 - (d) I do not intend to make final orders.

[7] Kaia's views can be expressed through the evidence of her parents. Mr Ford has not seen Kaia since the parties' separation. He is unable to contribute anything in respect of Kaia's views. Ms Evans' personal views are very clear. She expressed views on behalf of Kaia that no contact of any sort should occur.

[8] Kaia has said to the pre-school, "my dad is not a nice dad he was mean to me" but no weight can be placed on those statements because of the strong probability that Kaia has been influenced.

Background

[9] Mr Ford and Ms Evans met online at the end of 2010 and commenced a relationship shortly after.

[10] In about March 2011 Ms Evans became pregnant. The parties lived together for a short time during Ms Evans' pregnancy. At about the end of November 2011, shortly before Kaia's birth, the parties separated. Mr Ford attended the birthing unit twice following Kaia's birth and saw her again on 6 January 2012. In March 2012 Mr Ford went to Australia. He returned for about three weeks and spent time with Kaia and Ms Evans. The parties remained in contact and Mr Ford paid for Ms Evans and Kaia to travel to Adelaide to see him in mid 2012. After three weeks Ms Evans and Kaia returned to New Zealand. In January 2013 Mr Ford returned to New Zealand and the parties lived together until 22 March 2014 when they separated. Throughout their relationship there were periods of separation, the lengths of which are disputed.

[11] Since separation Kaia has been looked after by Ms Evans. Mr Ford has not seen her since that day due to the allegation of sexual abuse arising out of events of 16 March 2014.

[12] Mr Ford is employed as [occupation details deleted] and currently lives alone. Mr Ford has the support of his parents, Ted Ford and Angie Ford, both of whom gave evidence. Mr Ford has no criminal convictions of any sort and apart from the protection order of 12 May 2015, no other protection order has been issued against him.

[13] Until January 2009 Mr Ford was in a relationship with Tamara. Mr Ford and Tamara have a daughter Jade, now aged nine. In August 2009 Tamara moved with Jade to Australia. They have resided there since. Apart from when he was in Australia Mr Ford's contact with Jade has been in New Zealand. All contact has been unsupervised and has occurred during each school holiday period for two weeks and over the Christmas period for four weeks. In total this comprises ten weeks of contact each year. Contact between Mr Ford and Jade

has occurred without any known incident. Jade was last in New Zealand the week before this hearing when she had a two week contact period with her father.

[14] Ms Evans lives in Hamilton with her partner Sam, whom she met at the end of 2014. Together Ms Evans and Sam have a child Hunter born in November 2015. Ms Evans also has an older child Mio aged nine. Mio is in the shared care of Ms Evans and his father, on a week about basis.

[15] Not a great deal is known of Ms Evans' family. Her father died when she was an infant and her mother was not always able to care for Ms Evans. Ms Evans was cared for by other family members throughout her childhood. Ms Evans was supported in Court by a long term friend Sarah Creek, whom she had met while at school, and also by her maternal aunty, Sally Jones. Both filed affidavits and gave oral evidence. Both Ms Creek and Ms Jones have accepted categorically the allegations that Kaia has been sexually abused by Mr Ford and support Ms Evans' position that no contact of any sort should occur.

The law

[16] In determining the nature of a parenting order, the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration.

[17] In determining what best serves the children's welfare and interests, the Court:

- (a) Must take into account that decisions affecting the children should be made within a timeframe that is appropriate to their sense of time;
- (b) May take into account the conduct of the person seeking to have a role of caring for a children, to the extent that it is relevant to welfare and best interests; and
- (c) Must have regard to the principles set out in s 5 of the Act.

[18] The s 5 principles are:

- (a) a child's safety must be protected and, in particular, a child must be protected from all forms of violence (as defined in section 3(2) to (5) of the Domestic Violence Act 1995) 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.

[19] The principle issue to be resolved is the s 5(a) issue, that Kaia must be protected from all forms of violence. If contact is safe other principles then become relevant as to the orders to be made. Because a final protection order was made against Mr Ford, the Court must also have regard to the provisions of s 5A, and take into account:

- (a) Whether the protection order is still in force;
- (b) The circumstances in which the protection order was made;
- (c) Any written reasons given by the Judge who made the protection order.

Can any safety conclusions be drawn from the protection order?

[20] The final protection order between Ms Evans and Mr Ford was made after a defended hearing, Judge Mackenzie concluded:

- (a) That Mr Ford assaulted Ms Evans during an incident which occurred on 2 January 2014;
- (b) That Mr Ford engaged in swearing and verbal abuse towards Ms Evans, which was not frequent, but did occur and impacted on Ms Evans as she was sensitive;
- (c) Without the consent of Ms Evans Mr Ford copied a consensual video of sexual activities between the parties onto a DVD. This crossed the line from acceptable to unacceptable behaviour and could arguably be seen as potentially exploitive and voyeuristic.
- (d) In relation to the sexual abuse allegation, Judge Mackenzie stated¹:

I cannot make a determination one way or another as to whether Kaia has been sexually abused by her father or not. This is an issue of centrality between the parties. It needs to be addressed and resolved with a more complete evidential picture, including evidence from relevant experts. There are now Care of Children Act 2004 proceedings and at the conclusion of the Domestic Violence hearing, I will make a direction for a s 133 report in terms of the standard brief, but with the report writer to consider the alleged sexual abuse.

[21] Judge MacKenzie determined that an order was necessary for the protection of Ms Evans, as a consequence of:

- (a) Her genuinely held belief that there were real risks in terms of the safety of both herself and Kaia.
- (b) There being a reasonable basis for Ms Evans' fears and worries.

[22] This hearing proceeded on the basis that Judge MacKenzie's findings were accepted and that all findings were relevant in determining the issues as to Kaia's safety. Without in any way minimising what occurred I am satisfied that the violence found by Judge MacKenzie would not raise any safety issue that would

¹ Evans v Ford [2015] NZFC 2407 Judge MacKenzie at paragraph 61, 12 May 2005

impact on the making of contact orders on an unsupervised basis. I have reached that view because:

- (a) There was only one allegation of physical violence that occurred during the course of the relationship. The assault is on the lower end of the scale.
- (b) Though there has been some verbal abuse this was not of a sustained or serious nature and not to such an extent that it requires supervised contact to occur.
- (c) Ms Evans was found to be sensitive and have an underlining vulnerability. Provided contact is otherwise safe, Ms Evans' personal vulnerability must be weighed against the principle that Kaia is entitled to a relationship with both parents and with all of her family group.
- (d) Putting aside the sexual abuse allegations, the totality of all other findings would not normally result in contact either being stopped or in any way supervised.
- (e) Any safety issues that exists can be dealt with by protective conditions imposed under s 51 of the Act.

[23] The most significant risk is the sexual abuse allegation which Judge MacKenzie, could not determine. The findings on that issue will determine the nature of the contract, if any, between Mr Ford and Kaia.

Was Kaia sexually abused by Mr Ford?

[24] When an allegation of sexual abuse is made the courts task is twofold²:

² M v Y 1NZLR [1994] 527

- (a) It must first deal with the allegation; and
- (b) It must then determine the application in light of all of the circumstances that are relevant including its findings upon the allegation. In respect of the allegation the Court may determine:
 - (a) That sexual abuse occurred;
 - (b) That sexual abuse did not occur; or
 - (c) That the Court is unable to determine whether abuse occurred or not.

[25] If the Court is unable to determine with any confidence if sexual abuse occurred or not the Court must then make an assessment of risk. This may lead to conclusions:

- (a) That there should be no contact between a parent and child or;
- (b) That there should be contact which may be either supervised or unsupervised.

[26] In determining if contact should be either supervised or unsupervised the Court must then determine whether or not there is:

- (a) An unacceptable risk; or
- (b) An acceptable risk.

[27] Where the possibility of risk is slight then unsupervised access maybe acceptable if however the possibility of risk is high contact should be supervised.

The events of 16 March 2014

[28] The allegations of sexual abuse arose from events that occurred on 16 March 2014. On that evening Ms Evans went to the hospital to visit a friend. Prior to leaving she changed Kaia's nappy and put her into bed earlier than usual. A DVD was put on for Kaia to watch before she went to sleep. Mr Ford remained at home to look after Kaia. Sometime later Kaia who was awake got into her parents bed where she watched animal programs on T.V with Mr Ford. According to Mr Ford Kaia pooped her nappy which he proceeded to change. Whilst doing this Kaia started jumping up and down on the bedding spreading poo over it. Mr Ford cleaned up Kaia and then put the bedding in the wash. At some point Mr Ford sent Ms Evans a text saying "Kaia has smeared poos everywhere". She replied "cool have fun cleaning it up".

[29] Ms Evans returned home from the hospital at approximately 8.00 pm. She says that when she arrived home Kaia was awake and was distraught and crying and that Kaia kept repeating "it is a secret it is a secret". Ms Evans told Ms Orr that she and Kaia remained awake all night in the lounge and stayed in the lounge for the remainder of the week while Mr Ford slept in their bed. Mr Ford told Ms Orr that when Ms Evans returned from the hospital Kaia approached her for a cuddle and did not want to settle for bed as she was having fun. According to Mr Ford the household soon settled and they all slept as usual in their own beds. The next day, and for the remainder of the week, Mr Ford attended work and was unaware that issues were brewing.

[30] However on the evening of 16 March, Ms Evans became concerned that Kaia may have been sexually abused by Mr Ford, initially because of the poo on the bedspread and the comments made by Kaia when she returned home. Ms Evans says that she looked for a dirty nappy but was unable to find one. She packed up the bedding and retained it in case it was required as evidence. No forensic testing on the bedding has occurred.

[31] The next day Ms Evans' friend Sarah Creek, whom she had known for 20 years, came to the house as she regularly did. The visit was not pre-arranged. On arrival Ms Creek noticed Kaia hiding in a bush reluctant to come out and refusing to enter the house. This was unusual behaviour for Kaia. Ms Evans confided

in Ms Creek that she was concerned that something had happened to Kaia and that she may have been sexually abused by Mr Ford. Those discussions were likely to have been over heard by Kaia. According to Ms Creek Kaia was screaming and saying “I can’t tell you it’s a secret my dad touched my bum bum”. Ms Creek says that she observed bruises on Kaia, above and below her knees and on both legs.

[32] On 19 March 2014 Ms Sally Jones, Ms Evans’ maternal aunty, visited Ms Evans. The visit was also not pre-arranged. A discussion occurred, in all likelihood within Kaia’s hearing. Kaia told Ms Jones that “the monster would get me”. Kaia then made a “rah” noise like a monster. She kept saying that “it was a secret”. Kaia was upset when she was talking to Ms Jones. Ms Jones asked her “where’s the monster” and Kaia said that it was in her dad’s pants and pointed to her vagina. Ms Jones then asked Kaia what he did with the monster and Kaia said that “he played with my bum”. Ms Jones was certain that Kaia had been abused.

[33] On 20 March 2014 Mr Ford, Ms Evans and Kaia went to the hospital to visit Mr Ford’s grandmother. Mr Ford and his mother, who was there, both, say that the visit went well and Kaia was happy. Ms Evans says that Kaia was screaming and Mr Ford was trying to make her happy.

[34] On 22 March 2014 there was a birthday party for a cousin of Mr Ford’s. Ms Evans and Mr Ford arrived at the birthday party separately with Ms Evans arriving with Kaia sometime after Mr Ford arrived. Kaia was her normal happy self during the birthday and did not display any negative reactions or feelings of fear towards her father.

[35] Ms Evans and Kaia left the party first. Mr Ford then left the party and went to visit his parents. Whilst there Mr Ford received a text from Ms Evans requesting that he return home. When he arrived Mr Ford was confronted by Ms Evans and told to immediately leave because he had sexually abused Kaia. She said she had a video of him having sex with Kaia. Mr Ford denied the allegations of abuse and adamantly denied that there was any video of him having sex with Kaia. He left the home and has not since that moment seen Kaia.

[36] During the next year various comments have been attributed to Kaia, these having been said or over heard by a number of persons. As a result at what Kaia has said. Ms Evans believes that Mr Ford has:

- (a) Performed some sort of oral sex on Kaia;
- (b) Definitely made her perform oral sex on him;
- (c) Tried to insert his penis into Kaia's vagina or anus, causing her to poo.
- (d) Held Kaia down while doing this in order to prevent her getting away.

[37] Apart from statements made by Kaia Ms Evans accepted that she had no real evidence that Kaia had been abused but remained convinced that she had because of:

- (a) Kaia's behaviour on her return from the hospital on 16 March 2014;
- (b) Kaia's subsequent presentation and statements;
- (c) Mr Ford's paedophile type ways;
- (d) Past events which with the benefit of hindsight indicated to her that sexual abuse had previously occurred to Kaia;
- (e) Her genuine believe that Jade had also been sexually abused.

Kaia's medical examination and appointments

[38] On 25 March 2014 Kaia was taken to the family doctor. Ms Evans told the Doctor what she thought had happened and all of the things Kaia had said. This seems to have occurred with Kaia present. A copy of the medical notes has been produced. The doctor records:

The mother feels that she has had some interference from her estranged father, 10 days ago. He locked himself in the shower with her in the past and

when her mother confronted her he threw the mother against the wall. The child is safe at the moment as the father will not come back. Ten days ago she left Kaia with her father and when she came back the child would not leave her alone and was talking about "it is a secret, it is a secret" and when mother looked things looked a bit different. Then later she was begging mother to keep her safe. Then she said her father hurt her and she had a crocodile in her pants.

[39] The doctor did not conduct any medical examination of Kaia but was concerned that Kaia may have been abused. On 27 March 2014 the Doctor faxed a letter to Child Young and Family Services and began the process of organising a formal medical examination.

[40] On 28 March 2014 Kaia attended the Child Protection Advisory and Support Service and was thoroughly medically examined by consultant paediatricians Nena Sadani and Elanor Carmichael. Ms Evans gave them a background of the events and of Kaia's past medical and birth history. There is nothing within the report which suggests any concerns that past sexual abuse might have occurred. The physical examination noted:

- (a) That she had dry eczematous skin all over her body but mainly effecting her lower abdomen and pubic area.
- (b) On her legs there were some wear and tear grazes which were noted on both knees with bruises on both shins, there was no bruising above the knees.
- (c) An examination of the genital area demonstrated an intact hyman.
- (d) The anal examination was normal.
- (e) On examination of her mouth her frengue was intact.

[41] Kaia was noted to have had a normal physical examination which neither confirmed nor refuted that sexual abuse had occurred. The paediatric opinion was:

There is a history with CYF for this family. The high amount of anxiety reported by mother following Kaia being placed unsupervised for an unclear length of time in the father's care and having had her nappy changed is

worrying. I have concerns that Kaia was subject to either physical or sexual abuse when left in her father's care. Normal examination does not rule out abuse and these concerns should be investigated.

[42] An examination of Kaia's medical records shows that there have been a number of occasions when Kaia has suffered from diarrhoea, rashes and complaints that her vaginal area was red. One of these occurred on 1 April 2014, following the parties' separation which is highly unlikely to be linked in any way to sexual or physical abuse.

[43] Following the incident on 16 March 2014 Ms Evans began to have doubts regarding other incidences. When Ms Evans went to Australia with Kaia, she developed concerns about Kaia having an unusual lump on her vagina. Kaia was taken to the Doctor, who reassured Ms Evans that although Kaia's perineal raphe was more prominent than usual, it was a normal variant. Despite that medical report Ms Evans now thinks there is a huge possibility that Kaia may have been sexually violated by Mr Ford on her arrival in Australia. There is no evidence to support this contention.

[44] Another issue raised is that after 16 March 2014 Kaia was hysterically screaming and more distressed. In a medical note of 13 November 2013 the doctor records "active child screams when she is frustrated (door close), otherwise happy". There is a notation that she was possibly overeating or suffering from food intolerance and also that she was in her "terrible twos".

Can anything be concluded from Kaia's evidential interview?

[45] On 20 May 2014 an evidential interview took place at the Manuwai Video Unit conducted by specialist forensic interviewer, Karen Wilson. Kaia was then two years and five months old. Despite evidence that Kaia was articulate for her age this was not evident from the video. Initially Kaia was reluctant to answer simple and direct questions like "What is your name?". Ms Wilson struggled to engage Kaia in any significant dialogue. Kaia's replies to direct questions were almost always in one to three word sentences. Only one or two answers of four or five words in length were given. At the end of the interview Ms Wilson commented that Kaia was

just too young. The only comments of any significance made by Kaia were that “Mio was naughty”, “my dad’s naughty”, a comment which was difficult to hear but which seems to be “he smacked bum bum”, and something liked “he pooped my finger”. There is no clarification or context around these comments. The evidential interviewer commented, that it was hard to determine, what information was remembered, as opposed to being repeated, and whether Kaia was referring to sexual or physical events. Having listened to the interviews all answers given by Kaia are capable of innocent explanation in the context of the acknowledged events of 16 March 2014.

Allegations of grooming and paedophile type behaviour

[46] Ms Evans believes that Mr Ford demonstrates paedophile type behaviours and was engaged in grooming both Jade and Kaia. Ms Evans relies on:

- (a) Her belief that he treated Kaia and Jade “in a paedophile way” in which lollies and ice cream were okay for dinner;
- (b) That the children were being groomed with lollies, sweets or other treats so that they could be sexually abused by him;
- (c) That Mr Ford walked around the house in his underwear;
- (d) That Mr Ford had deviant sexual tendencies as evidenced by the video that he had made of their sexual activities.

[47] Ms Evans acknowledges that she gave the children ice cream and lollies but considered there was a difference because of the way in which it was done. Mr Ford tended to do this on a more regular basis and at tea time. It is not unusual for people to have different views about feeding certain types of food to children. In the absence of other evidence no other conclusion can be drawn.

[48] The way in which adults clothe themselves in the privacy of their own home differs from family to family. In the absence of other evidence there is nothing to

suggest that walking around the house in underwear raises concerns for the safety of Kaia.

[49] The tape was a consensual tape of sexual activity between the parties. No inference can be drawn against Mr Ford that cannot also be drawn against Ms Evans for her consensual participation. In the protection order proceedings Judge MacKenzie was critical of Mr Ford for copying this video and relabeling it. Whilst this may have been inappropriate it does not demonstrate any issue of sexual deviancy towards children which raises concerns for Kaia's safety.

[50] Ms Orr gave evidence that grooming generally starts with an innocent activity that escalates to the point of sexual abuse. There was nothing in the Mr Ford's behaviours that suggested escalation or that Mr Ford was in any way involved in grooming Kaia or Jade. The examples of Mr Ford acting in a paedophile way were not accepted by Ms Orr as activities that were either evidence of paedophilia or of grooming.

[51] I find that there is no evidence that any of these activities display a tendency to paedophilia or that they were in any way an attempt to groom either child for the purpose of sexually abusing them.

Evidential interview - Jade

[52] After the allegation was made that Mr Ford had sexually abused Kaia, Jade was evidentially interviewed in Australia. The report confirmed that Jade did not disclose any abuse nor express any concerns regarding the contact that she had with Mr Ford. Notwithstanding the allegations that had been made, and the decision that Jade be evidentially be interviewed, there were no gaps in the contact between Jade and Mr Ford.

[53] Ms Evans is certain that Mr Ford has sexually abused Jade and despite the evidential interview continues to believe that abuse has occurred. Ms Ford was

certain that Jade would disclose that she been abused by Mr Ford and was “hoping that she would”. Ms Evans seemed genuinely surprised that she had not.

Rape allegation

[54] In April 2014 Ms Evans approached the police alleging that in April 2013 after returning home from the dentist, still drowsy after having been sedated, she was raped by Mr Ford. The complaint was never raised in the domestic violence proceeding and not progressed with the police. Ms Evans was concerned that the stress of being involved in a further prosecution was too great and that if the investigation was not stopped that she would become unwell. Very little information is contained in the evidence regarding this allegation. Mr Ford denies that anything occurred. I cannot be satisfied on the balance of probabilities that Ms Evans was at anytime raped by Mr Ford and cannot take this evidence into account in determining safety issues in respect of Kaia.

Conclusions in respect of abuse allegation

[55] Given Ms Evans’ vigilance in attending to Kaia’s medical needs it is surprising that there was a delay in reporting that Kaia may have been abused, particularly when Ms Evans had the support of both Ms Jones and Ms Creek. However Ms Evans was distressed and the possibility that Kaia had been sexually abused was raised with both Ms Creek and Ms Jones. I note also Ms Evans’s evidence that an attempt to ring the doctor was made but that an appointment could not be immediately obtained. Although the delay is surprising, I accept it as neutral.

[56] The evidential video provided by Kaia cannot be relied upon for the reasons that I have already stated. Given Kaia’s age it was always unlikely that the interview could be relied upon for evidential purposes.

[57] The paediatric report was inconclusive and does not enable any conclusion to be reached that abuse had either occurred or had not occurred.

[58] Ms Evans' concrete and continued assertion that sexual abuse occurred is a neutral factor. A person's genuinely held belief regarding a fact is not proof of the fact itself.

[59] Ms Evans' assertions that grooming has occurred is neither proof that abuse occurred nor proof that it did not. If Mr Ford was grooming Kaia or Jade this would have been relevant. However I have found no evidence that Mr Ford was grooming either child.

[60] Retaining the bedding that Kaia pooped on is neutral. In the absence of forensic examination, the bedding adds nothing to the allegation of abuse. That it was pooped on by Kaia is consistent with Mr Ford's account of what happened. The decision to keep it must have occurred immediately after the events on 16 March 2014. In the circumstances it is surprising that no attempt has been made to have the bedding forensically examined.

[61] Ms Evans was raped as an adult and the person's responsible were convicted following a trial. Ms Orr gave clear evidence which I accept, that there is no researched based evidence of any correlation between a parent's own experience of sexual abuse and the making of allegations that a child has been sexually abused.

[62] There is no evidence that an allegation by Ms Evans, that her oldest son Mio may have been abused, is likely to lead to an allegation being made in relation to Kaia. I agree with Ms Orr that this is a neutral factor.

[63] Mr Ford walking around the house in his underwear in front of his children, although not liked by Ms Evans, is not an indication of likelihood that he will sexually abuse children.

[64] The incident that occurred on 2 January 2014 I accept as being neutral. There is no evidence to suggest that anything occurred in the shower other than that Mr Ford, who was fully clothed, was in the room to assist Jade to wash and condition her hair.

[65] There is no evidence to suggest that a person involved in the making of a consensual sex tape or in possession of adult pornography is in anyway likely to be a risk to the children.

[66] In the same way that Ms Evans' concrete beliefs that Kaia has been abused are neutral so is Mr Ford's consistent denial of sexually abusing Kaia.

[67] The support provided by the parents and family members or friends of both parties is not evidence that abuse either occurred or did not.

[68] That Kaia's alleged sexualised behaviour has not been evident in more recent times is not evidence that abuse either occurred or did not. Ms Orr's evidence regarding a child's ability to recall events is highly relevant in this regard.

[69] Ms Evans says that Kaia had bruises on her legs, upper legs and back following the 16 March incident. I cannot draw any conclusions from these bruises because:

- (a) The paediatrician did not notice upper leg or back bruises;
- (b) They could have been caused by normal childhood play;
- (c) They might have occurred when Mr Ford cleaned Kaia.

[70] There are some issues regarding Ms Evans' credibility. Examples include:

- (a) Ms Evans stating she had not been abused as a child, which was contradicted in a very clear way by Ms Creek.
- (b) Ms Evans' recollection of the number of times that Mr Ford saw Kaia immediately after her birth with Mr Ford account being more accurate as evidenced by photographs that have been provided.
- (c) Mr Ford's account of the amount of time he spent with Kaia after his return from Australia appears more accurate than Ms Evans'.

- (d) Ms Evans lied about the video she said she had of Mr Ford having sex with Kaia. This is acknowledged by her. Ms Evans said she lied for the specific purpose of testing her suspicions that Mr Ford had sexually abused Kaia. The allegation may be understandable in light of Mr Ford having videos of sexual activity with both herself and a previous partner.
- (e) The rape allegation and an allegation of being held by the throat were never disclosed in the protection order proceedings. Given their seriousness this is surprising.
- (f) Ms Evans was evasive when questioned about some matters. Her evidence about the DPB was an example.

[71] Although these examples raise concerns regarding Ms Evans' credibility they neither prove nor disprove abuse. Ms Evans concrete, unmoving position together with question marks about her credibility do raise issues regarding her recollection of events, her ability or willingness to consider any alternative proposition other than that Kaia was abused and the possibility that she may mislead for her own advantage. This is important in assessing the conflicting accounts as to what occurred on Ms Evans's return home on 16 March 2014, the accuracy of statements attributed to Kaia and her interpretation of other events.

[72] Ms Evans is an anxious person. Ms Orr's evidence is that an anxious person tends to catastrophise events and look for confirmatory bias information that reflects their opinion whilst discarding information that does not. This provides a reasonable explanation as to how Ms Evans has taken a series of events and used them to form a view which cannot be supported by the evidence.

[73] The events of 16 March are capable of innocent explanation. There is no doubt that Kaia soiled herself. Mr Ford was required to clean her up and the bedding was soiled in the process of doing this. Mr Ford must have touched Kaia's bum and may well have got poo on his finger. He acknowledges smacking Kaia on the hand.

Mr Ford texted Ms Evans, which although not something he would normally do, is understandable.

[74] The fact that Kaia was upset when her mother returned from the hospital is consistent with Kaia having pooped her pants, made a mess on the bed being smacked and having not gone to sleep. It is also contextually consistent with the report given to the doctor that Kaia was at times unsettled, could scream and was in her terrible twos.

[75] Although Kaia's reported behavioural changes may be consistent with something having happened to her there is insufficient evidence to draw any conclusion that any change occurred because she was abused. Changes in Kaia's behaviour may have occurred for reasons including discussions held in front of her, her father having left the home, medical examination, a change of home, Ms Evans' own distress and anxiety, or Ms Evans' over reporting of what happened as a consequence of being more vigilant or looking for confirming information.

[76] In the face of an explanation of events that is both credible and consistent with the known facts, other evidence would need to be available before any finding of sexual abuse can be made. Apart from Kaia's statements, which are not reliable, no reliable evidence exists.

[77] In all likelihood the most reliable statements made by Kaia were those made immediately on Ms Evans' return from the hospital or soon after. Kaia's statements that night and on the next day to Ms Creek, are consistent with Mr Ford's account of events.

[78] Some of the attributed statements to Kaia would appear to be more advanced than she was capable of, as evidenced by the evidential interview.

[79] Statements made by Kaia to Ms Creek, Ms Jones and others were made after discussion had occurred in front of Kaia and appear to be in answer to direct questions asked of Kaia.

[80] I accept the evidence of Ms Orr that Kaia's statements may well have been influenced by adults and have been scaffolded by them. I accept also Ms Orr's evidence regarding the ability of Kaia to recollect incidences at her age and to repeat them. This evidence suggests that statements made by Kaia even within a short period of time of the events of 16 March could not be recalled by her with any accuracy without being scaffolded by another adult.

[81] Although Kaia may have used the word "secret", I am reluctant to draw any conclusion that she was unaware of that word before 16 March or had not previously used it. I am also unwilling to draw any inference that the use of that word refers to sexual abuse.

[82] No notes were taken of statements made by Kaia. It would be difficult for any witness to later recall with any real accuracy statements made by Kaia or to place them into the context in which they were made. For that reason statements made by Kaia have to be treated with considerable caution.

[83] I specifically find that there is no evidence that Mr Ford has in any way groomed Kaia or Jade.

[84] I place significant weight on the fact that there is no evidence that Jade has ever been abused by her father despite many opportunities for that to have occurred during extended periods of unsupervised contact. On the contrary the evidence suggests that Jade was never sexually abused by her father.

[85] There are no identified risk factors in relation to Mr Ford which would make him inclined to be a risk to children. In particular:

- (a) There is no police history of any significance.
- (b) Mr Ford is employed and has stable employment and housing.
- (c) Mr Ford is identified as having adequate parenting skills.

- (d) Mr Ford has maintained a positive relationship with Jade and with Jade's mother, sufficient to ensure that contact is ongoing notwithstanding the allegations made.
- (e) There is nothing within Mr Ford's family background which would be of any concern.
- (f) Mr Ford has undertaken the Individual Male Respondent Program. The report received from Ms Orr is that Mr Ford was fully involved and committed to the counselling process.
- (g) There is no suggestion that Mr Ford abuses alcohol.
- (h) There is an allegation made by Ms Evans that Mr Ford has used drugs and in particular methamphetamine. This was denied by Mr Ford and was not pursued during cross-examination.
- (i) There is no evidence that Mr Ford has had at any time possession of child pornography or material in respect of children that is of any concern.
- (j) During the course of his evidence Mr Ford appeared to be a generally credible witness. The information he provided was consistent with independently ascertainable events.

[86] Having considered all matters I am not convinced that there is any evidence that can be relied upon that suggest that Mr Ford has sexually abused Kaia. In the end am I left in no doubt that Kaia was not sexually abused by Mr Ford.

How should contact between Mr Ford and Kaia occur

[87] Having found that Kaia was not sexually abused and that there are no other safety issues. The issue arises as to how contact between Kaia and Mr Ford should occur.

[88] There has been no contact between Mr Ford and Kaia since 22 March 2014. Ms Evans is totally opposed to any contact and is unlikely to accept that Kaia was not sexually abused or welcome contact between Mr Ford and Kaia on any conditions.

[89] I must have regard to the principles of the Act and in particular principle 5(e), that Kaia should continue to have a relationship with both of her parents, and that her relationship with her family group should be preserved and strengthened. I take also into account principle 5(b) that Kaia's care, development and upbringing should primarily be the responsibility of both her parents.

[90] After the completion of the evidence I indicated that I was going to make orders that contact occur but that I had not determined on what basis that would happen. At the same time I made an s 46G referral to counselling to assist the parties in the implementation of any orders that I made.

[91] The purpose of s 49C is to ensure that proceedings are concluded and that the making of a final order is not unnecessarily delayed. The finalisation of proceedings is consistent with the s 4 principle that the Court must take into account that decisions affecting a child should be made and implemented in a time frame that is appropriate to a child's sense of time. Finalisation and certainty is also consistent with the leave requirement in s 139A which requires leave to be obtained if a new proceeding is filed within a two year period of a substantially similar proceeding having been determined by the Court.

[92] However, despite the emphasis in the Act on determining matters on a final basis, I do not consider that I am bound to make final orders following a substantive hearing unless all outstanding issues are capable of final determination. I find that contact issues remain incapable of being finally determined. Section 49(2) entitles a Judge to make an interim order if a child's welfare and best interests require an interim order to be made rather than a final order.

[93] There are very valid reasons to be cautious in the approach to Mr Ford's contact with Kaia:

- (a) Mr Ford disappeared from Kaia's life very suddenly and at her age she is unlikely to have had any understanding as to why that occurred.
- (b) Kaia is unlikely to have any memory of Mr Ford.
- (c) Ms Evans is likely to be very anxious about contact and is unlikely to accept the findings in this judgment.
- (d) There is a significant risk that contact will be undermined by Ms Evans as a consequence of her strongly held belief that Kaia should have no contact whatsoever with Mr Ford.
- (e) There is a risk of further allegations being made against Mr Ford.
- (f) Ms Orr was unable to meet with Kaia and Mr Ford and the Court will benefit from an updated report once some contact has occurred.

[94] I have heard evidence from both Mr Ford's parents. I consider them to be suitable persons to provide oversight as to contact. At least in the interim it is in Kaia's best interest if some oversight occurs. It is not intended that this oversight be long term but that it remain in place until a further report is obtained from Ms Orr.

Orders

[95] I now make the following orders:

- (a) Kaia Evans born [date deleted] 2011 is to be in the interim day-to-day care of Tessa Evans.
- (b) James Ford is to have interim contact with Kaia Evans as follows:

(i) Step one

For six visits at a Court approved contact centre. Those visits are to be weekly on a Saturday for a period of two hours. The contact costs are to be met by the Court. Ms Evans will drop off and uplift Kaia at the beginning and the end of each contact visit. Times for the contact visit will be arranged by the contact centre in conjunction with Ms Evans.

(ii) Step two

For six visits for four hours each visit. These visits are to occur each Saturday from 11 am until 3 pm;

(iii) Step three

Contact each Saturday from 10:00 am to 4:00 pm. This is to continue until further order of the Court.

(iv) It is a condition of contact at steps two and three that one of either Angie Ford or Ted Ford be present at all times.

(v) It will be a condition of contact during the interim period that:

- i. Kaia not be bathed or showered while in the care of Mr Ford.
- ii. If there is any personal care issues that need to be tended to that they be attended to by Angie Ford.

- (c) It is a condition of the parenting order that neither parent talk to Kaia about adult issues. Ms Evans is not to tell Kaia that she has been sexually abused by her father.

[96] Counsel are invited to file a memorandum within seven days with proposals as to pick up and drop off arrangements at steps two and three. It is the Court's view that pick up and drop off should occur either by Ms Evans picking up and dropping off Kaia from the home of Mr Ford's parents or with pick up and drop off being at a neutral venue.

[97] An updated s 133 report is to be provided by Ms Orr. Directions are made under s 133(8) that a meeting occur between the child, Mr Ford and the report writer at some point during either step two or three contact. Lawyer for child is to file a brief for approval by the Court within the next 21 days.

[98] Lawyer for child appointment is to continue and is to be extended to assist in the making of arrangements for step one contact.

[99] The matter will be further reviewed at the end of October 2016.

[100] Leave is reserve to all parties to seek further directions regarding the implementation of these orders.

G S Collin
Family Court Judge