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.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2014-470-54
[2014] NZHC 3213

BETWEEN	MOORE Appellant
AND	MOORE Respondent

Hearing: 23-24 June, 28-30 October 2014

Counsel: AAM Kershaw for the Appellant
P Jones and B Ron for the Respondent
A H Brown as lawyer for the children
M Coleman for the Attorney-General (on 28-29 October 2014)

Judgment: 15 December 2014

JUDGMENT OF BROWN J

This judgment was delivered by me on 15 December 2014
at 3 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Crown Law, Wellington
Hamertons, Whakatane
Beachside Legal, Mt Maunganui
Counsel: A Brown, Tauranga

[1] Subsequent to her separation from the appellant in February 2010, the respondent became an adherent of the Jehovah's Witness faith and, without the appellant's consent, introduced their children, a daughter ("D" then aged 6 years) and a son ("S" then aged 4 years) to that faith. Initially the respondent had care of the children but in a decision dated 24 March 2014 the Family Court placed the children primarily in the care of the appellant. However the Judge declined to continue the interim guardianship order which had placed constraints on the children's participation in the Jehovah's Witness faith.

[2] Both the appellant and respondent challenge that decision, seeking respectively guardianship directions either constraining or permitting the children's participation in the Jehovah's Witness faith. Counsel for the children resists the making of such directions, contending that the children's freedom in respect of religion granted by ss 13 and 15 of the New Zealand Bill of Rights Act 1990 (NZBORA) deprives the Court of any jurisdiction to make such directions.

[3] The key issues for decision are:

(a) Should there be any variation of the parenting order which would reduce the children's time in the respondent's care?

(b) In view of ss 13 and 15 of NZBORA does the Court have jurisdiction to make guardianship directions relating to the children's participation in the Jehovah's Witness faith?

(c) If the Court does have jurisdiction, should any of the guardianship directions sought be made?

The 2013 and 2014 Family Court orders

[4] In his judgment dated 24 March 2014 the subject of this appeal, Judge J P Geoghegan discharged the then existing parenting orders and an interim guardianship order dated 2 August 2013 and made the following orders:

(a) The children are to be in their mother's care at the following times:

(i) For two consecutive weekends out of every three with the first of those weekends from Friday after school to Monday morning before school and in the second weekend from Friday after school to 3.00 pm Sunday afternoon.

(ii) Every Wednesday evening from after school to 7.00 pm.

(iii) For the first half of each school term holidays from 4.00 pm on the day the school term finishes to 4.00 pm the following Friday.

(iv) Each alternate week during the Christmas school holidays commencing at 4.00 pm Boxing Day in each year.

(v) At other times as agreed.

(b) The children are to be in the care of their father at all other times.

[5] The interim guardianship order which was discharged had contained the following directions concerning the children's involvement with the Jehovah's Witness faith:

(a) That the children shall not attend Jehovah's Witness meetings or church activities including seminars or door knocking.

(b) That the children shall not be involved in or exposed to bible study including the reading of passages from the Watchtower.

(c) That the mother shall not discuss the Jehovah's Witness faith or teachings with the children.

[6] However in the judgment under appeal the Judge specifically chose not to make further guardianship directions which would have prevented the children from participating in such activities. He considered that it would be artificial and impractical to prevent their involvement in their mother's faith but observed that the

change in day-to-day care meant that the impact of the children's involvement in the faith would, at least theoretically, be lessened.[1]

The appeal and cross-appeal

[7] The grounds of the appeal detailed in the Notice of Appeal dated 14 April 2014 are (with some editing):

(a) That in dismissing both parties' applications for guardianship directions pursuant to s 44 (now s 46R) of the Care of Children Act 2004 ("COCA") as to whether the children should be included in the Jehovah Witness faith, the Judge has left the parties in a legal position whereby the guardians must act jointly (s 16(5) COCA), however they cannot do so as they remain in dispute about an important guardianship matter, namely religion (s 16(2)(e) COCA), creating a legal abyss.

(b) That the effect of the decision impinges on the appellant's right as a guardian to hold and impart on his children in any meaningful way any religious views or guidance without adding to the children's internal conflict, and impinges on the children's ability to develop any real freedom of thought, conscience and religion, such rights reserved under Article 14, United Nations Convention on the Rights of the Child.

(c) In undertaking the s 4 COCA best interests assessment the Judge erred in his assessment that the new care arrangement would effectively balance religious matters for the children, lessening the concerns about indoctrination and lessening the impact of their involvement in the Jehovah's Witness faith without the need for guardianship directions.

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1 At [55].

(d) That in undertaking the s 4 COCA best interests assessment, the Judge placed insufficient weight on the evidence that the children are suffering internal conflict due to the division in their parents' belief systems.

(e) That the care arrangement ordered is a shared care arrangement, despite the findings of the Judge at [50](g) that the psychological evidence does not support such an arrangement.

(f) That the Judge erred in fact in basing his decision on the premise that the respondent's church days are Tuesdays and Sunday from 4 pm, that the children are not actively involved in bible study and, by inference, that these are the times the children would be most involved in the faith if in her care.

[8] The appellant seeks to have the parenting order set aside and replaced with an order under (now) s 48 providing that:

(a) The appellant shall have day to day care;

(b) The respondent shall have contact:

(i) Every second weekend from Friday after school until Sunday at 9.00 am;

(ii) During the second week of the school holidays from Wednesday morning until Sunday at 9.00 am; and

(iii) Every alternative week during the Christmas holidays, from Wednesday morning until Sunday morning.

[9] The appellant also seeks the following guardianship directions pursuant to (now) s 46R of the Act:

(a) That the children shall not attend Jehovah's Witness meetings or church activities including seminars or witnessing;

(b) That the children shall not be involved in, or exposed to, bible study including the reading of passages from the Watchtower;

(c) That the children not be excluded from any school or extracurricular activities on the basis of religion, to include the Cool Bananas religion programme in school, school productions, school camps, sports, and any other extracurricular activities; and

(d) That the children be permitted to attend birthday, Easter and Christmas celebrations whilst in the appellant's care.

[10] Although the respondent filed a cross-appeal on 14 May 2014 against both the parenting order and the absence of any guardianship directions, her stance was refined in her written submissions. She continues to oppose any variation to the current care arrangements but no longer pursues a cross-appeal for a direction that the children continue to reside primarily with her.

[11] With reference to the guardianship directions, she considers that directions (c) and (d) are not contentious and simply reflect the status quo. However she opposes directions (a) and (b) and she pursues her cross-appeal in relation to the care arrangements, seeking a direction that the children can be involved with and exposed to the Jehovah's Witness faith.

Leave to appeal

[12] The appeal against the parenting order is available as of right. However the appeal against the Judge's refusal to make guardianship directions requires leave.[2]

[13] As noted above[3] previously there were interim guardianship orders in force which curtailed the children's involvement with the Jehovah's Witness faith.

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2 Care of Children Act 2004, s 143(2).
3 At [5] above.

Although those orders were discharged in Judge Geoghegan's judgment, he recognised that the issue of the children's involvement in the Jehovah's Witness faith could not be avoided[4] and it appears to have been his expectation that the new care arrangement would address some of the concerns which had prompted the seeking of the guardianship directions.[5]

[14] In fact the appellant and the respondent are united in their desire for the Court to make guardianship directions, the absence of which has been described by the appellant as the creation of a legal abyss. In my view it is appropriate for the Court to hear the appeal in respect of both the parenting order and the refusal to continue the guardianship directions. Accordingly leave to appeal from the decision not to make guardianship directions is granted under s 143(2).

The two hearings in the High Court

[15] The appeal and cross-appeal were set down for a hearing of one and a half day's duration. The hearing commenced on 23 June 2014. Both the appellant and the respondent gave updating evidence and they were cross-examined at some length. Mr Higgs, a Court appointed psychologist, also gave evidence and was cross-examined.

[16] At the Family Court hearing, in addition to hearing from Ms Brown, the lawyer for the children, and Mr Higgs, Judge Geoghegan interviewed D. However S declined to attend a judicial interview. At the initial hearing of the appeal both children indicated a wish to meet with me and I interviewed them in the presence of Ms Brown, initially together and then individually.

[17] The hearing of evidence and the conduct of the interviews with the children occupied almost the entire period allocated for the initial hearing. Consequently the hearing was adjourned to be completed at a later date. Ms Brown having foreshadowed a challenge to the Court's jurisdiction to make guardianship directions of the nature sought, I issued a Minute dated 25 June 2014 in which I invited the Attorney-General to make submissions on the issue of the Court's jurisdiction to

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4 At [27] below.
5 At [26] below.

give such directions. Ms Coleman filed written submissions and appeared at the resumed hearing on 28 October 2014.

[18] Both parties filed brief updating affidavits for the resumed hearing and both were cross-examined, again at some length. I also conducted further interviews with both the children in the presence of Ms Brown.

Approach on appeal

[19] The appeal is brought under s 143 of the Act and accordingly is a general appeal by way of rehearing.[6] As the Supreme Court stated in *Austin, Nichols & Co Inc v Stichting Lodestar* an appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal.[7] It is only if the appellate court considers that the appeal decision is wrong that the appellate court is justified in interfering with it. However as the Court further said:[8]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[20] The Supreme Court subsequently stated, in *Kacem v Bashir*, in the context of a "relocation" appeal under the Act:[9]

> [35] ... It is trite but perhaps necessary to say that judges are required to exercise judgment. The difficulties which are said to beset the field are not conceptual or legal difficulties; they are inherent in the nature of the assessments which the courts must make. The judge's task is to determine and evaluate the facts, considering all relevant s 5 principles and other factors, and then to make a judgment as to what course of action will best reflect the welfare and best interests of the children. While that judgment may be difficult to make on the facts of individual cases, its making is not assisted by imposing a gloss on the statutory scheme.

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6 Section 143(4), District Courts Act 1947, s 75.
7 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4].
8 At [16].
9 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1.

[21] The weight which an appellate court gives to the reasoning of the Court below is a matter for the appellate Court's assessment: *Kacem v Bashir*.[10] No deference is required beyond the customary caution appropriate when seeing the witnesses provides an advantage because credibility is important.[11] In this case the advantage of the Judge was minimal because I have had the opportunity to observe the parties give evidence on two occasions.

[22] Furthermore where the appellate Court admits further evidence, that evidence necessarily requires de novo assessment and consideration of how it affects the correctness of the decision under appeal.[12] In this appeal not only have I twice heard the parties give evidence, I have also had the benefit of updating evidence from Mr Higgs and I have twice interviewed the children. The Judge below did not have the benefit of an interview with S. In those circumstances I will proceed more directly to form my own opinion rather than focusing on whether there was any error in the judgment of the nature asserted by the parties.

The Family Court judgment

[23] Observing that to understand the dispute it was necessary to traverse the history, the Judge first outlined the litigation history spanning the period from February 2010 to the hearing in December 2013,[13] including the directions made by the Judge on 2 August 2013.[14] The judgment then proceeded to review the following matters:

(a) The children's views;[15]

(b) A cultural report in respect of the Jehovah's Witness faith undertaken at the Court's request by Dr Ben Schontahl;[16]

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10 *Kacem v Bashir*, above n 9, at [31].
11 *Austin Nichols*, above n 7, at [13].
12 *Kacem v Bashir*, above n 9, at [31].
13 Judgment under appeal, at [5]-[13].
14 At [5] above.
15 At [14]-[20] and [25]-[29].
16 At [21]-[24].

(c) The evidence of the psychologist Mr Higgs who had prepared a s 133 report for the Court dated July 2013;[17] and

(d) The behaviour and attitudes of the parents.[18]

[24] After noting the relevant legal principles, the Judge made the following express factual findings:

> [50] Having heard the evidence in these proceedings I make the following findings:
>
> (a) That the issue of religion was never an issue between the parties prior to their separation.
>
> (b) That after their separation [the respondent] has become increasingly involved with the Jehovah's Witness faith and has involved both children in the faith without discussion or consultation with [the appellant]. It needs to be said however that given the parties difficult relationship I am not surprised that that consultation did not occur.
>
> (c) That my assessment of [the respondent] is that she has a strict adherence to the faith with a literal interpretation of the beliefs of that faith. I consider her ability to be objective in terms of religious matters generally to be questionable which would provide limitations around her ability to recognise the legitimacy of other religions. This may well have an impact upon the children, particularly in the area of their developing social circles and networks as they get older, and which may not be directly connected to their faith.
>
> (d) That while both parents are able to provide for the day-to-day needs of their children [the respondent] is showing signs at present that she is struggling with the behaviour of the children and particularly with the manipulative behaviour which is exhibited from time to time by [D] and which, in my assessment, is a matter of growing concern. There is a need, particularly where [D] is concerned, for the imposition of clear boundaries and firm consequences in order to deal with that behaviour.
>
> (e) That [the appellant] is more likely to be able to provide the authoritative environment which the children need and is also more likely to be able to improve and enhance the children's educational achievements and progress.
>
> (f) That clearly the children are both closely attached to each parent. The children also have a clear wish to be involved in

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17 At [30]-[34].
18 At [35]-[43].

the Jehovah's Witness faith, although the weight that can be attached to that wish is, in my assessment, slight given that they do not have the maturity to assess the principles and teaching of the Jehovah's Witness faith. They clearly enjoy being involved in it however and should not be prevented from that involvement to the extent which is consistent with their best interests and welfare.

(g) That the children are in favour of a shared care arrangement with their parents. The psychological evidence however does not support such an arrangement given the inability of the parties to work together in a co-operative manner. In this regard both parties will need to honestly assess the part that they have had to play in these proceedings, the criticisms they have made of each other's parenting and their role in creating conflict which is impacting upon the children.

[25] The Judge's conclusion on the parenting order was prefaced by a summary of the parties' positions as follows:

> [52] In terms of the day-to-day care of the children [the appellant] seeks an order placing the children in his care on a day-to-day basis with [the respondent] having contact every second weekend from Friday after school until Sunday at 9.00 am. He proposes further contact during the second week of the school holidays and for every alternate week of the Christmas holidays.
>
> [53] [The respondent's] position is rather more difficult to assess however, essentially she is seeking retention of the status quo. In an affidavit sworn in February 2013 she had suggested that an option to resolve matters would be one where [the appellant] had the care of the children every week from Sunday until Wednesday which meant that the children would not be attending Jehovah's Witness meetings with her, those meetings being on a Sunday and Tuesday. This would effectively involve however a type of shared care arrangement which the psychological evidence does not support.
>
> [54] Ultimately the ideal day-to-day care arrangement for the children is one which is difficult to assess as care arrangements which are ideal involve parents who are willing to work together in a co-operative and respectful manner in the best interests of the children. In any other circumstances the Court really is making the best of a bad set of circumstances. Weighing up the matters referred to above however I consider that it would be in the children's best interests to be in the day-to-day care of their father although I would add that this is by a fine margin. ...

[26] The Judge then explained his reasons for declining to make any guardianship directions in this way:

> [54] ... I do not consider that there should be any prohibition on the children attending the Kingdom Hall or being involved with their mother's faith when they are in her care. I am of that view for two reasons. The first

is that the children have the right to be exposed to each of their parents religious beliefs all other things being equal. The second is that the care arrangement to be imposed will, in my assessment, have the effect of lessening the concerns which [the appellant] has regarding the children's alleged "indoctrination" in their mother's religion.

[55] It follows that I do not intend to make the guardianship directions that [the appellant] seeks. Making such a direction would, in my assessment, be contrary to the children's best interests and would disregard their wish to be involved in their mother's faith, a wish which is entitled to be accorded some weight. I consider that it would be artificial and impractical to prevent their involvement in their mother's faith. As I have said however, I consider that the change in day-to-day care means that the impact of their involvement in the faith will, at least theoretically, be lessened. The real key to the children thriving rests in their parents being able to appreciate the important role of the other parent in the children's lives and in the development of a co-operative and respectful relationship. Regrettably that is a matter which is beyond the Court's control.

[56] The evidence of [the respondent], which I accept is that she attends the Kingdom Hall on a Tuesday night between 7.00 pm and 8.30 and each Sunday from 4.00 pm to approximately 6.00 pm. She also engages in study with her bible teachers for one to two hours each week however those studies are not at set times or set days. While I intend to make provision for [the respondent] to have contact with the children each Wednesday evening I do not intend to make guardianship directions which would prevent the children from going witnessing or being involved in bible studies during that time. The reasons for that are that firstly, there is no evidence which establishes that the children have been involved in bible studies directly as opposed to simply being in [the respondent's] house at the time that such studies are undertaken, and secondly, that such a direction is unnecessary for the reasons already given. It is best left to [the respondent] to determine how she would spend that time with her children.

[27] Finally, prior to detailing the orders recorded at [4] above, the Judge commented:

[57] I would emphasise as well that the parenting arrangement which I am imposing is not being imposed because of one parties' decision to be involved in a particular religion or other. Although the issue of the children's involvement in Jehovah's Witness faith cannot be avoided in terms of this decision there are also significant issues around my observations as to [the respondent's] disregarding of [the appellant's] right to be consulted on a significant matter of guardianship and also upon [the appellant's] ability, in my assessment, to provide structure and boundaries which will better meet the needs of the children both socially and academically.

Correlation of grounds of appeal with the judgment

[28] The framing of the parenting order apparently by reference to periods of time during which it was anticipated (as it transpired erroneously) that the children would not be attending the Kingdom Hall was the subject of the sixth ground of appeal.

[29] It is not apparent from the judgment on what basis the decision was reached to place the children in the care of the respondent for two weekends to every one weekend for the appellant. However the curtailment of the respondent's care at 3 pm on Sunday afternoon of every second weekend appears to have been directed to ensuring that the children attended the Kingdom Hall on only one of the two consecutive weekends. Similarly the choice of Wednesday evening for the midweek care appears to have been governed by the same motivation in view of the respondent's attendance at meetings on Tuesday evenings.

[30] In the event the curtailment to 3 pm on the second Sunday did not achieve its objective because the respondent began to attend the Kingdom Hall on Sunday mornings. Her most recent statement as to the children's participation in religious activities with her was in her affidavit of 28 October 2014, which was handed up at the commencement of the resumed appeal, as follows:

(a) One hour Wednesday evening reading and family worship;

(b) One hour on Sunday witnessing. This occurs approximately one in three Sundays; and

(c) One and a half hours at Kingdom Hall on Sundays.

[31] However it was apparent from the oral evidence that there were still further episodes of religious activities. There was an acknowledgement of witnessing having occurred on at least one Saturday since the soccer season finished. The updated memorandum of counsel for the children as to their views dated 27 October 2014 noted D's expectation that now that soccer had finished she would be able to do more "Field Worship" (door knocking) on Saturday mornings with her mother.

[32] There was also an indication in Ms Brown's memorandum as to the children's views obtained at a meeting at school on 31 March 2014 that, provided that they did all their homework, they would be permitted to go witnessing with their mother on Wednesday evenings. The respondent also took the children to a Jehovah's Witness convention in Hamilton on 18 and 19 October 2014.[19]

[33] The fifth ground of appeal turned on the appellant's contention that the effect of the parenting order was a shared care arrangement. That proposition was advanced on the basis of an analysis by reference to the 2014 calendar which demonstrated that the respondent has 103 full overnights a year or 143 if Wednesdays were added into the equation. The analysis suggested that she collected the children from school 68 times (34 per cent of the time) with the appellant collecting the children 131 times. Such an arrangement was said to be inconsistent with the finding at [50](g) that the psychological evidence did not support a shared care arrangement.

[34] The remaining grounds of appeal (grounds one to four) together with the two grounds of cross-appeal were all focused on the implications of the decision to decline to make guardianship directions. Indeed the respondent's written submissions on ground one (the creation of a legal abyss) succinctly stated that the respondent agrees with that ground of appeal, submitting that directions are necessary from the Court in order to clarify the situation for the parties and the children which is an on-going issue requiring to be addressed.

Care of Children Act 2004

[35] The purpose of the COCA is twofold: to promote children's welfare and best interests, and facilitate their development, by helping to ensure that appropriate arrangements are in place for their guardianship and care and to recognise certain rights of children.[20] The COCA is a code, having effect in place of the rules of the common law and of equity as to the guardianship and custody of children.[21]

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19 The respondent also attended on Friday 17 October 2014. This is referred to further at [76] below.

20 Section 3(1).

21 Section 13.

Care of Children Amendment Act (No 2) 2013

[36] The Care of Children Amendment Act (No 2) 2013 made changes to a number of provisions applicable in this case including s 4 (the paramount consideration) and s 5 (the principles relating to a child's welfare and best interests). Those amendments came into force on 31 March 2014,[22] seven days after the decision the subject of this appeal.

[37] The appellant's written submissions addressed in some detail the question whether the legislation in its now amended form applies to the determination of this appeal and cross-appeal. Those submissions focused upon the transitional provisions in s 165 of the 2013 Amendment, s 160 of the COCA, and the decisions of the Court of Appeal in *X v Y*[23] and of Heath J in *RG v DG*.[24] The appellant contended, and the respondent agreed, that the provisions in the 2013 Amendment apply to this appeal.

[38] While I agree with the ultimate contention, I do so for different reasons. It is well-established law that in an appeal by way of rehearing the law to be applied is that in force at the date of the appeal hearing. As Somers J stated in *Pratt v Wanganui Education Board*:[25]

> There is a difference between an appeal and an appeal by way of rehearing. On an appeal judgment can only be given as should have been given at the original hearing. On a rehearing judgment may be given as ought to be given if the case came at that time before the court of first instance: see, for example, *Quilter v Mapleson* (1882) 9 QBD 672, 676; *Attorney-General v Vernazza* [1960] AC 965; [1960] 3 All ER 97. But the direction that an appeal shall be by way of rehearing does not mean that there is to be a complete rehearing as, for example, in the case of a new trial. Under such a direction the appeal is to be determined by the court whose members consider for themselves the issues which had to be determined at the original hearing and the effect of the evidence then heard as it appears in the record of the proceedings but applying the law as it is when the appeal is heard and not as it was when the trial occurred: see *Attorney-General v Birmingham, Tame and Rea District Drainage Board* [1912] AC 788, 801-802. The most recent discussion of the matter of which I am aware is in *Da Costa v Cockburn Salvage & Trading Pty Ltd* [1970] 124 CLR 192, particularly at p 208 et seq, per Windeyer J. There is a short summary of the matter in *Supreme Court Practice 1976*, vol 1, para 59/3/1 [refer now 1997, vol 1, para 59/3/1].

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22 Care of Children Amendment Act (No 2) 2013 Commencement Order 2014.

23 *X v Y* [2006] NZFLR 237, (2005) 25 FRNZ 442 (CA).

24 *RG v DG* [2006] NZFLR 453 (HC).

25 *Pratt v Wanganui Education Board* [1977] 1 NZLR 476 (SC) at 490.

Guardianship directions and parenting orders

[39] Guardianship is a status held by an adult in relation to a child under 18 years. The definition of guardianship in s 15 reflects the change in emphasis from custody and control[26] to what Heath J in *Hawthorne v Cox* described as a cooperative process requiring collaboration between guardian and child (on the one hand) and between guardians themselves (on the other).[27] As is the usual position,[28] both the appellant and the respondent are guardians jointly of D and S.

[40] The responsibilities of a guardian are spelled out in s 16 which provides in material part:

> **16 Exercise of guardianship**
>
> (1) The duties, powers, rights, and responsibilities of a guardian of a child include (without limitation) the guardian's—
>
> (a) having the role of providing day-to-day care for the child …; and
>
> (b) contributing to the child's intellectual, emotional, physical, social, cultural, and other personal development; and
>
> (c) determining for or with the child, or helping the child to determine, questions about important matters affecting the child.
>
> (2) Important matters affecting the child include (without limitation)—
>
> …
>
> (c) medical treatment for the child (if that medical treatment is not routine in nature); and
>
> (d) where, and how, the child is to be educated; and
>
> (e) the child's culture, language, and religious denomination and practice.
>
> (3) A guardian of a child may exercise (or continue to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with the guardian, unless a Court order provides otherwise.
>
> …

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26 Under the Guardianship Act 1968.

27 *Hawthorne v Cox* [2008] 1 NZLR 409 (HC) at [55].

28 Section 17(1).

(5) However, in exercising (or continuing to exercise) the duties, powers, rights, and responsibilities of a guardian in relation to a child, a guardian of the child must act jointly (in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child.

(6) Subsection (5) does not apply to the exclusive responsibility for the child's day-to-day living arrangements of a guardian exercising the role of providing day-to-day care.

[41] In *Hawthorne* Heath J observed that the dual focus on determination and assistance in s 16(1)(c), coupled with the general policy shift towards a more child-centred approach to guardianship, reflected the concept applied in *Gillick v West Norfolk and Wisbech Area Health Authority.*[29] His Honour said:[30]

> [60] In my view, the principles underlying s 16(1) can be expressed as:
>
> (a) The younger the child, the more likely it is that decisions about important matters will need to be *made* by his or her guardian.
>
> (b) As the child gets older and becomes more mature, the guardianship role changes to that of an adviser or a counsellor, endeavouring to assist the child to make good decisions.
>
> [61] Put in those terms, the Act is consistent with the philosophy underpinning *Gillick*, namely that a parent's interest in the development of his or her child does not amount to a "right" but is more accurately described as "a responsibility or duty". The terms of s 16 itself reflect that proposition.

[42] The resolution of disputes between guardians is addressed in s 46R:

> **46R Disputes between guardians**
>
> (1) If 2 or more guardians of a child are unable to agree on a matter concerning the exercise of their guardianship, any of them may apply to the court for its direction.
>
> ...
>
> (4) On an application under subsection (1), the court may make any order relating to the matter that it thinks proper.

[43] It follows from the nature of the guardian's responsibility in s 16(1)(c), with the dual focus on determination and assistance, that the Court's jurisdiction to

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29 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

30 *Hawthorne*, above n 27, at [60]-[61].

resolve matters which concern the exercise of guardianship is broad. Such a matter may relate not just to a guardian's decisions but also extend to a parent determining a matter with a child or assisting a child.

[44] Parenting orders are determinations relating to the provision of day-to-day care for, and contact with, a child. Section 48 provides:

> **48 Parenting orders**
>
> (1) On an application made to it for the purpose by an eligible person, the Court may make a parenting order determining the time or times when specified persons have the role of providing day-to-day care for, or may have contact with, the child.
>
> (2) A parenting order determining that a person has the role of providing day-to-day care for the child may specify that the person has that role—
>
> (a) at all times or at specified times; and
>
> (b) either alone or jointly with 1 or more other persons.
>
> (3) A parenting order determining that a person may have contact with the child may specify any of the following:
>
> (a) the nature of that contact (for example, whether it is direct (that is, face to face) contact or some form of indirect contact (for example, contact by way of letters, telephone calls, or email)):
>
> (b) the duration and timing of that contact:
>
> (c) any arrangements that are necessary or desirable to facilitate that contact.
>
> (4) A parenting order (whether an interim parenting order or a final parenting order) may be made subject to any terms or conditions the court considers appropriate (for example, a condition requiring a party to enter into a bond).

[45] In proceedings under the Act the welfare and best interests of a child in his or her particular circumstances is the first and paramount consideration.[31] Any person considering the welfare and best interests of a child must take into account the principles in s 5 which states:

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31 Section 4(1).

5 Principles relating to child's welfare and best interests

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

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

[46] Speaking in *Kacem v Bashir* with reference to the former s 5 [the references to (b) and (e) are now (d) and (a) respectively] Tipping J said:[32]

> [21] There is nothing in the language of principle (b) or in the structure of s 5 as a whole to suggest that principle (b) or any of the other principles there set out should have any presumptive weighting as against other principles referred to in the section. That could hardly be so when the principles must be considered in all the many and varied proceedings and circumstances in which the welfare and best interests of children come into issue. Relocation is only one of a number of such contexts.
>
> [22] All the principles, save for (e), are couched in the language of "should". In principle (e) the word used is "must". As we have already indicated, principle (e), if relevant, will generally carry decisive weight in the factual assessment. That is probably why this principle is couched in terms of "must" rather than "should. "Should" signals a desirable objective, the fulfilment of which, and by what method, will depend on the presence of other desirable objectives and the facts of individual cases. "Must" signals an essential factual requirement. The ultimate point is that principle (b) cannot be read as having any presumptive precedence over the other principles, or indeed any presumptive precedence of a stand-alone kind.

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32 *Kacem v Bashir*, above n 9, at [21]-[22].

The children's views – the implications of s 4(4)

[47] Section 6, which was not the subject of any change in the 2013 Amendment, states:

> **6 Child's views**
>
> (1) This subsection applies to proceedings involving—
>
> (a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or
>
> (b) the administration of property belonging to, or held in trust for, a child; or
>
> (c) the application of the income of property of that kind.
>
> (2) In proceedings to which subsection (1) applies,—
>
> (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
>
> (b) any views the child expresses (either directly or through a representative) must be taken into account.

[48] Counsel for the children advanced an argument that there had been a change in the significance to be given to the children's views as a consequence of the amendment to s 4 in the 2013 Amendment. Previously s 4 materially stated:

> ...
>
> (6) Subsection (5) does not limit section 6 (child's views) or prevent the court or person from taking into account other matters relevant to the child's welfare and best interests.
>
> (7) This section does not limit section 83 or subpart 4 of Part 2.

[49] As a consequence of the 2013 Amendment s 4(4) now reads:

> (4) This section does not–
>
> (a) limit section 6 or 83, or subpart 4 of Part 2; or
>
> (b) prevent any person from taking into account other matters relevant to the child's welfare and best interests.

[50] Ms Brown argued that previously a child's views did not predominate over the child's welfare and best interests because the effect of the former s 4(6) was that

only s 4(5) did not limit the child's views. By contrast s 4(4) now provides that nothing in s 4 in its entirety (hence including the first and paramount consideration in s 4(1)) limits s 6. She described this as a significant change which not only allowed the Court to elevate a child's views above the first and paramount consideration but fundamentally reversed the previous position that the child's views were subject to what was in the child's welfare and best interests. Indeed she acknowledged that her submission would mean that, depending on the weight given to a child's views, the welfare and best interests of the child could be totally ignored.

[51] Resisting that submission, Ms Kershaw submitted that the amendment to s 4 simply aligned the provision with the analysis of the law as explained by Randerson J in *C v S*:[33]

> [31] ...
>
> (h) The expression "take into account" is stronger than the common statutory formula "have regard to" but it does not go so far as to oblige the decision maker to act in accordance with any view expressed by the child. That would run counter to the Court's wider obligation to assess what the child's welfare and best interests require: s 3. ... It is implicit that the Court retains a discretion to give such weight to the child's views as it considers appropriate in the circumstances of the case. Despite the omission in the new section to the age and maturity of the child (in contrast to s 23(2) of the 1968 Act) the legislature cannot have intended that a Court should not have regard to those factors along with such other considerations as may be relevant to an assessment of the weight to be given to the child's views.

[52] Ms Kershaw submitted that the amendment simply confirmed that in all cases the Court must provide the child with a reasonable opportunity to express a view and that view must be taken account of, despite it possibly being considered not to be in the child's best interests to obtain that view.

[53] I agree with Ms Kershaw's argument that, while s 4(4) makes it clear that s 4 (including the paramountcy principle) does not limit s 6, nothing in s 4(4) elevates the meaning of s 6 to a direction to the Court that the child's view can trump the child's welfare and best interests.

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[33] *C v S* [2006] 3 NZLR 420 (HC).

[54] Of course there will likely come a point in the child's maturity where the child's view will become determinative. However at that stage the adoption of the child's view and respect for the child's autonomy will be synonymous with the child's best interests and welfare.

The "package of care" approach

[55] Counsel for both parties approached the appeal on the basis that the parenting order and the guardianship directions which each party sought constituted a "package" of care. That was most explicit in the opening comments of Ms Kershaw:

> ... the issues in this case can be reduced to whether the package of care taken into account ... the failure to make guardianship directions by [the Judge] and the time that has been allocated for the mother's contact is in the children's best interests ... although there has been a lot of emphasis on the guardianship directions sought, the appellant's case is twofold and that is that the package of care does not meet the children's best interest because (a) the time that has been ascribed to the mother under the parenting order is too great to rebalance the issue that [the Judge] saw and that on top of that her ability to do whatever she likes in terms of teaching their children through Jehovah's witness faith exacerbates that matter.

[56] While it is convenient to traverse the evidence as a coherent whole, parenting orders and guardianship directions need to be considered separately. They are treated differently in the COCA in terms of appeal rights: in proceedings under s 46R a party or child may appeal only with the leave of the High Court[34] and no appeal at all lies to the Court of Appeal.[35]

[57] Ms Kershaw suggested that the orders (a) and (b) which were sought as guardianship directions could also be made in the form of terms or conditions to a parenting order pursuant to s 48(4). I note that *Butterworths Family Law in New Zealand* includes in the list of examples of conditions which the Court might impose, a condition that a child be brought up (or not brought up) in a certain religion.[36] Unlike a number of the other examples of conditions, no authority is cited for that view. *Brookers Family Service* includes in the list of conditions which have been attached to orders determining day-to-day care the condition that the child should be

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34 Section 143(2).
35 Section 145(1)(a).
36 Mark Henaghan and Others *Butterworths Family Law in New Zealand* (16th ed, Lexis Nexis, Wellington, 2014) at 331.

brought up in a particular religion, attend a particular church and participate in religious education classes at school.[37]

[58] While it is possible that a condition as general as the nomination of a religion might be the subject of a condition to a parenting order, I consider that it is more appropriately addressed as a guardianship direction, particularly in view of s 16(1)(c) and (2)(e).

[59] My approach to the consideration of the appropriate parenting order is essentially similar to that of Judge Geoghegan at [57],[38] namely that a parenting order is not to be imposed because of one party's decision to be involved in a particular religion.

Case law

[60] Save for Ms Brown's argument on s 4(4),[39] there was general agreement among counsel for the parties and the children that the primary consideration is the welfare of the children. While individual cases are of limited assistance as they turn on their particular facts, a number of propositions were sought to be drawn from the cases to support the parties' positions.

[61] Ms Kershaw cited *Piper v Piper* for the proposition that a parent has no absolute right to bring up children as he or she thinks fit and that where there is a conflict between parents in their beliefs the ordinary standards of society must be adopted.[40] Judge Bremner there cited the decision of Fraser J in *H v F*:[41]

> That is not to say that Exclusive Brethren parents do not have the right and the responsibility to bring up their own children as they think right in accordance with their own conscience and beliefs, but when it comes to the Court deciding what is in the best interests of children, whose own parents do not subscribe to those views, the standards to be applied are not those of the Exclusive Brethren but those of society at large.

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37 Patrick Mahony (ed) *Brookers Family Law Child Law* (online looseleaf ed, Brookers) at [CC48.41].
38 Above at [27].
39 At [50] above.
40 *Piper v Piper* [1994] NZFLR 625 (FC).
41 *H v F* (1993) 10 FRNZ 486 (HC) at 500.

[62] Mr Ron distinguished *H v F* from the present case noting that it had involved an application by non-Exclusive Brethren natural parents for care of their three children who were living with Exclusive Brethren grandparents. He also distinguished *Piper v Piper* first on the basis that it concerned only an interim care arrangement and secondly because no psychological evidence had been available at the hearing unlike the present case where, in Mr Ron's submission, psychological evidence clearly suggests that "balancing" is the method that the Court should adopt.

[63] Mr Ron placed emphasis on *L v M*[42] where a father had sought to exclude children from involvement in the Jehovah's Witness faith. Judge Binns there observed:[43]

> The children have a need to be exposed to their mother's and father's belief systems, particularly as there is no evidence of any harm to the children from these belief systems which might impact negatively on their welfare and best interests in a significant way. There is the potential for emotional harm if Mr L is overtly critical of Ms M's religious beliefs.

[64] Ms Kershaw argued that under the current arrangement the children were likely to reject one parent and that that might be their primary caregiver. She further suggested that undermining the parental authority of the primary caregiver could result in conduct disorders. She contended that support for the proposition, that the primary caregiver should, where a choice is to be made, maintain authority, can be found in the judgment of L'Heureux-Dube J in *Young v Young*:[44]

> ... It is precisely the cases in which children become embroiled in religious conflict that cast doubt on the wisdom of the decisions which have allowed the religious rights of the access parent to prevail ... Where there is conflict over religion the courts must secure the long-standing authority of the custodial parent to make decisions over religious activities. This ensures that stress occasioned by such issues does not become a continuing and ultimately destructive feature in the life of a child after divorce.

Ms Kershaw drew attention to the tendency of Family Court decisions to reflect the views of the primary caregiver.[45]

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42 *L v M* [2011] NZFLR 337 (FC).
43 At [91].
44 *Young v Young* [1993] 4 SCR 3 (SCC) at 97.
45 In addition to *L v M*, above n 42, *P v F* (1983) 2 NZFLR 27 (FC), *Skedgwell v Ewington* [1992] NZFR 641 (FC) and *S v N* FC Manukau FAM-2007-055-321, 30 April 2008.

[65] Ms Coleman drew attention to *S v N* as the only New Zealand case in which a court has applied *Gillick* principles when considering the capacity of children to participate in religious practices. Mr S and Ms N shared the care of two children aged nearly 10 and five and a half. Ms N participated in a program called "ACCESS Energy Transformation". While Judge Adams noted that ACCESS did not fall within the central definition of "religion" as being the belief in superhuman controlling power, he noted that it did deal with spirituality and offered tools to its adherents to enable them to pursue greater clarity in their lives in accordance with the teachings. The Judge concluded:[46]

> It is my view that an appropriate balance for these girls, taking into account their parents' differing views about this matter, is to permit them to be peripherally involved but to rule that they should not be centrally involved by either enrolment in any ACCESS event or by their substantially attending any ACCESS course. By that I mean they should be permitted to wander in and out of where the activity is occurring (these events are not particularly attractive to children because they tend to involve adults sitting around a room with a leader facilitating discussion) but the girls should not be sitting in the room for an hour at a time taking notes and participating in any events. That should endure until they reach an age at which they can choose for themselves. Given the ages of these girls I cannot predict when that would be yet, but presumably sometime around 14 years of age (give or take) is likely to be the time. I am referring to "Gillick" competence.

Parental conflict and its effect on the children

[66] Judge Geoghegan described the parents' relationship as highly conflicted with an absence of constructive communication.[47] The intensity of the conflict between the parties is manifest from the description of the history of the dispute at the commencement of the judgment. Mr Higgs acknowledged to Ms Jones that the conflict had gone on unabated for four years during which time it had not diminished at all and that over those four years the children had had to manage conflict on a day to day basis. Whereas the conflict was originally over a wide range of issues, it had latterly become focused on religion and was a psychologically damaging issue for the children.

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46 *S v N*, above n 45, at [43].
47 At [8].

[67] In a passage in the judgment which fed into the finding at [50](f)[48] the Judge stated:

> [20] I consider that the children while closely attached to both of their parents are clearly aware of the conflict between them and are being detrimentally affected by that conflict. …

I consider that that conclusion was materially influenced by Mr Higg's view[49] that, while both parents were highly child-focused and generally refrained from placing the children in the middle of their dispute, the differing values set, as reflected in the different religious beliefs and parenting styles, inevitably exposed the children to conflict between them.

[68] My perception was that there had been occasional attempts to accommodate the other party's (or perhaps the children's) wishes. In the case of the respondent she had agreed to the children going to Saturday morning soccer notwithstanding that they were then in her care. For his part the appellant had attended the "barn dance". However those glimmers aside, the situation remained as described by Mr Higgs and the Judge.

Cognitive dissonance

[69] In his oral evidence Mr Higgs explained that when he first interviewed and observed the children in 2010 he did not notice any particular dissonance, making the further point that the children were then too young to have the reasoning capacity to have dissonance.

[70] Mr Higgs' updated psychological assessment dated 17 June 2014 described the phenomenon in this way:

> 5.27 The different values and practices of their mother's faith and their father's more secular values and lifestyle should provide a balance for the children.
>
> 5.28 Unfortunately the differing values and practices at each of their parent's homes create confusion and worry for the children as a result of "cognitive dissonance".

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48 At [24] above.

49 Referred to in the judgment at [31](d).

> 5.29 Sadock & Sadock [2003] define cognitive dissonance as "incongruity or disharmony among a person's beliefs, knowledge, and behaviour". They note when dissonance becomes too great people change their ways of thinking or behaving to lessen the disharmony.
>
> 5.30 Cognitive dissonance generally occurs when there is a palpable disparity between two elements of behaviour causing an uncomfortable state of tension that persons are motivated to change.

Mr Higgs considered that the children were worried, anxious and experienced dissonance as a consequence of the conflicting values and prohibitions they experience with each of their parents.

[71] A practical example concerned the children's participation in Cubs (D) and Keas (S). Mr Higgs observed the children at their father's home where they happily talked about their activities and had certificates on the wall reflecting their participation. However S had informed Ms Brown that learning about Jehovah was better than his friends, better than soccer and better than Keas. Indeed he told her that he worried about going to Keas sometimes because "Keas teaches us about false religion and tells us that Jehovah doesn't exist".[50] Mr Higgs drew attention to this contradiction for S, making the point that this is not really a conflict that one wants a child of six or seven to be engaged in.

[72] That this instance of contradiction remains current was illustrated in the appellant's updating affidavit of 28 October 2014:

> 6. Both children are now enrolled in Cubs which they love but it clashes with the Jehovah Witness teachings, which is still causing them confusion. I have seen the children shuffling and disrespecting the leaders at flag time, the children have also spoken to me about their concern the badges they get are seen as competitive. Also, recently the Cubs went for a bush walk under the stars. It was a great night and the leaders were discussing the constellations, using an I-Pad to help explain this. Both children had an excellent time. The following week the children came back from [the respondent's] saying things like that's [constellations] all "witch craft" and "false gods" its "nothing to do with the stars", "Jehovah made the whole world".

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50 Memorandum of Lawyer for the Children as to views for appeal – 16 June 2014.

Recent events

[73] The updated memorandum of the lawyer for the children dated 27 October 2014 and my own observations of the children at my last interviews revealed both encouraging signs and troubling attitudes.

Birthday parties

[74] The Judge had referred at [17] to D's attitudes to Christmas and attending birthday parties in the course of his interview with her. In his oral evidence in June Mr Higgs made reference to D's comment about birthday parties. Although she enjoys birthday parties, because she knew that her father wanted her to go to parties, her mother did not, and because Jehovah does not approve, D did not know what was the right thing to do. Hence she took the conservative approach and decided not to go.

[75] On this subject Ms Brown's updated memorandum stated:

> 6. As to balance in the children's lives, it was notable to see a bit of a change in the children's general demeanour about two important things:
>
> a. Birthday parties and friends, and
>
> b. Music.
>
> 7. It seems that [S] had his birthday party last week and had 6 friends over. ... He spoke openly about the great party he had and his friends coming over. [D] also said she was there, and took responsibility for the food and drinks and that it was fun.
>
> 8. Furthermore, [D] was happy to talk with me about her plans for a party for her birthday (a few weeks away) and how many friends she was going to invite. It was to be at dad's house with games.
>
> 9. There was absolutely no reference to Jehovah being displeased, or angry about this. The children chatted about parties without any sense of concern or guilt as was witnessed by me at our last interview.

[76] S's birthday party was held on a Thursday afternoon. The appellant had wanted to hold it on the weekend but he claimed that the respondent would not agree to swap one of her weekends to enable that to be arranged. In fact it happened that S stayed at his father's home on the evening prior to his actual birthday to

accommodate the respondent. Although the appellant was not aware of it at the time, the reason why that was convenient for the respondent was because she was attending the Hamilton convention on the Friday. She picked up the children at 8 am on the morning of S's birthday and returned with them to the convention.

[77] In his affidavit of 28 October 2014 the appellant stated that, while S was looking forward to the party, on the Wednesday he returned from being with the respondent and asked if he could perhaps just have a "party" and not a "birthday party".

[78] I set out the respondent's response in her most recent affidavit verbatim:

> Paragraph 19 is again taken out of context. [S's] birthday is on [date] and therefore his party on [date] was a "party". My innocent remark was misconstrued. If I was not prepared to compromise I would not have offered the Appellant the children on Friday through to Saturday which was the actual birthday.

[79] I found this explanation unconvincing. The respondent, whose standard of English is not particularly high[51] appeared unable to understand my question as to the meaning of the third sentence. I also viewed as somewhat disingenuous the "compromise" referred to in the final sentence given the respondent's participation in the convention at this time and the consequent early hour of the pick up on the birthday morning.

S's t-shirt incident

[80] Another incident on which there was a conflict of evidence concerned S wearing his t-shirt inside out. On Wednesday 24 September 2014 S was collected from school in his uniform by the respondent for Wednesday contact. When the appellant collected him later that evening he was wearing his Pokemon shirt inside out. Although the appellant said this was not of particular concern to him, on arriving at his home he did ask S was he aware that his shirt was inside out. To the appellant's surprise S said that the respondent had told him to turn it inside out as it had a picture on it that Jehovah would find offensive.

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[51] At [32] of the judgment it is recorded that English is not [the respondent's] first language and that her evidence in the Family Court was given with the aid of an interpreter.

[81] It was put to the appellant in cross-examination that S had given that explanation to him as an excuse because he thought that he might get into trouble because he was wearing the shirt inside out. The appellant responded that S had raised the same concern on a number of occasions. Indeed as recently as the previous day S had rejected another shirt because it had a picture on it that the respondent did not like. It was apparent to me from my subsequent interview with S that he had a genuine concern about this issue: it was not a convenient excuse.

[82] In her affidavit in response the respondent said that the fact that S put his t-shirt on inside out had nothing to do with her or Jehovah's Witness beliefs. She stated that she did not instruct him. Indeed she stated that they did not have any discussion about the issue. However in cross-examination, when asked why she did not tell S that his t-shirt was inside out and to put it on the right way, she replied that she did ask him to turn the t-shirt back the right way, that he refused, that she asked him why, and that S simply said: "I want this way".

[83] After my interview with S I indicated to the respondent that I had gained the impression that the reason why the incident took place about the t-shirt was because he did not want to upset her and that it had something to do with Jehovah. I asked her if she could tell me why S might think that. The following extract concluded my questioning on the point:

> Q. When you have a family meeting at home –
>
> A. Yep.
>
> Q. - where your friends come and you share the Bible and the like, so there's lots of other Jehovah's Witness children there, would you be happy for [S] to wear the Pokemon t-shirt?
>
> A. There's no need to.
>
> Q. Would you be happy for him to wear it?
>
> A. I would suggest him change another t-shirt. It's not that because I'm upset, it's just, it doesn't disturb everybody. It's common sense.
>
> Q. It might disturb some people?
>
> A. Maybe I don't know.

Q. Well if you don't know then why would you bother asking him to change it?

A. Because I feel uncomfortable.

Q. About what?

A. About anything that the pictures that I don't know, yeah, um, just the cartoons and I, I choose some things that I know, that I know that is good, that is comfortable and is colourful and is happy and suitable.

Q. So, you would choose something suitable and [S] knows also then that you would like him to wear something that's suitable, correct?

A. Yeah.

Q. And the Pokemon t-shirt he has gathered is not suitable?

A. Well I have a choice, he just clean, a put a new clean clothes for him and the clothes are from his father's house, they needed to go back because the father's always asking, you know, just is it –

Q. Yes, my question to you was, to the effect that [S] has worked out that the Pokemon t-shirt is not suitable. You agree with that?

A. Yeah, in his mind.

[84] However the consequence appears to be that there are a large number of t-shirts in his wardrobe which S will no longer wear. I apprehend that it is for a similar reason that S indicated that he would not take his prized Star Wars-themed Lego set to his mother's house.

Attendance at D's concert

[85] The updated memorandum noted that D is a very talented young guitarist and is a member of a group practising for a concert (part of a national concert series throughout New Zealand) to be held at the local Baptist Church. The memorandum stated:

12. [D] is very excited and has been practising hard. When I asked her if mum was going, she said she didn't know. I asked about whether there might be a problem for mum going to the Baptist Church for the concert and she agreed that might be the case. Then [S] piped up and said he didn't want to go either because it might offend Jehovah. [D] was silent on that issue and had no further comment, except to add later that she was excited about going. This concert does fall on a weekend (Friday night) that the children will be with their mother.

[86] The respondent confirmed in the course of her evidence that she would not be attending the concert. When I asked her to tell me precisely why she did not want to go to the Baptist Church where the concert was being held, she related at some length the bible story of Jesus evicting the money lenders and dove sellers from the temple. When I asked her whether Jesus would have objected to someone performing songs in the temple like D was going to do, she indicated he would not agree with that because the house is for true worship. However it was also apparent that she would not go to the Baptist Church even for a religious event because she had found truth at the Kingdom Hall.

[87] The appellant claimed that D had discussed with him the situation concerning the upcoming concert, that she was quite confused and that she struggled to know what she could and could not do. He described her as being at a crossroads. As the memorandum notes it appears that S has his own dilemma concerning whether he should attend the concert.

Other incidents

[88] The episode about the concert at the Baptist Church is not an isolated incident. Both the children have performed very well at soccer. At my most recent interview S proudly displayed the award he had received at the soccer prize giving. However the soccer prize giving in the last two years has been held at the local Baptist Church. Consequently the respondent has not attended.

[89] Still further incidents were traversed in the course of the updating evidence. Needless to say the parties had significantly different perspectives on those issues. I have drawn attention to these particular examples because, although they might seem trivial in the eyes of some adults, they serve to illustrate the uncomfortable state of tension referred to by Mr Higgs.[52]

[90] The children engage with that tension on a daily basis, for example in the decision-making process which they appear to undertake about what television programmes are suitable to be viewed. Such decisions do not concern the Censor's

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52 At [70] above.

classification but rather whether Jehovah would approve of the programme. Hence, Harry Potter would not be acceptable because of the wizardry context. Such decisions are being made by the children at their father's home: the respondent does not currently have a television.

The children's views

[91] The judgment notes in some detail the intensity of the children's engagement with the Jehovah's Witness faith.[53] That intensity has not diminished in the period since the judgment. Indeed D is very firm in her desire to have the weekly contact with her mother changed from Wednesday to Tuesday in order that she could be included in the Bible study group preparing for worship on the weekend.

[92] The intensity of D's commitment is reflected in the following extract from the updated memorandum:

> h. I asked [D] what would be the most important thing for her if she had one wish (and only one). She took some time to think about that and said *"that dad would be in the Truth"* (meaning, following Jehovah). But she also said that she really needed 2 wishes to make her life happiest. The second wish was that *"I can learn about Jehovah with no stopping"*. Her explanation for that was that she wanted to learn about Jehovah EVERY day, not just mum's days.

[93] Similarly in the case of S, when Ms Jones put to Mr Higgs that S had indicated that the balance of time with his parents under the current order was not quite right for him and that he would prefer more time with his mother, Mr Higgs responded that according to his recollection S was saying that he wanted more time to study Jehovah which, he said, was not quite the same thing.

[94] The Judge noted that D had to some degree attempted to resolve the conflict between her parents by attempting to persuade her father to become a member of the Jehovah's Witness faith.[54] On a comparative scale the appellant described D's current level of endeavour to recruit him as "about 150%". He also explained that, whereas previously he had tended not to get involved with discussions, he has more recently actively tried to be involved but without success. The view which D

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53 See [23](a) above.
54 At [33].

conveys to him is that D is "in the light" because her mother is in the light while the appellant is "in the dark".

[95] Ms Brown's updated memorandum concluded as follows:

> 14. However, to be clear, the children both are very adamant about participating in their worship of Jehovah, attending the Hall, studying the bible and attending other study groups.
>
> 15. When I put it to the children how would they feel if the Judge decided that they were not allowed to worship Jehovah by doing those things, they were very clear. [S] said he would be "angry". [D] said she would be "very sad". I asked them to explain why they would feel that way. [S] said *"it would feel like I was being put in a jail"*. [D] said *"I would not be free, and it would be like in a jail"*.

[96] While I share Judge Geoghegan's view that the children's wishes in relation to religion have been heavily influenced by the respondent, their views are genuinely held and are not to be dismissed.[55]

Should there be a variation of the parenting order?

[97] I agree with Judge Geoghegan that the principles which the Court is required to take into account and which are of particular relevance in this appeal are those set out in s 5(b), (c), (d), (f) and the principle in (e) that a child should continue to have a relationship with both his or her parents.[56]

[98] In my view the evidence, including in particular the further evidence available to me on appeal, supports the conclusion that it is in the children's best interests that they are in the day to day care of their father. Judge Geoghegan reached that conclusion (in his words) by way of a fine margin. My view, which has been reached with the benefit of Mr Higgs' perception that the children have settled reasonably well into their father's home, is more conclusive that the children's interests are best served by being in the day to day care of their father.

[99] It is essential however that the children should have an appropriate period of time with their mother. The key issue so far as the parenting orders are concerned (I

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55 *M v A* [2013] NZHC 831 at [50].

56 The equivalent provisions referred to by Judge Geoghegan at [51], which pre-dated the 2013 Amendment, were s 5(a), (b), (c) and (f).

address the children's views concerning the Jehovah's Witness faith in the context of the guardianship directions) is the proportion of time to be spent in each parent's care. A significant consideration in determining that proportion of time is the overall balance which can reasonably be attained in these children's lives.

[100] It is quite apparent that the appellant has significant antipathy towards the Jehovah's Witness faith. However it is also necessary to recognise that the appellant is a teacher who, as the Judge noted,[57] places considerable emphasis on the importance of education. He has a concern, which the Judge accepted as valid, that because of the tendency of members of the Jehovah's Witness faith not to avail themselves of tertiary education, that this will hinder the children's educational progress.

[101] His dual motivation was usefully illustrated in two paragraphs of his updating affidavit:

> 4. Accordingly, in terms of time to undertake leisure and other unstructured social activities with the children we have Friday to Sunday once every 3 weeks and one week in the holidays. It is not enabling me to balance the extreme amount of time the children are spending with [the respondent] on Jehovah Witnessed (sic) based activities.
>
> 5. It is very difficult for me to arrange play dates for the children and as such these have been rare. When they occur they are sometimes short – only 30 to 45 minutes in length. Most things are crammed into the one weekend I have with them every three weeks and need to be planned well in advance. The socialisation I so desperately wish for the children is so easily accessible to [the respondent] but her time is used primarily to meet what she sees as the children's need for moral and spiritual development.

[102] The inter-relationship between those motivations was recognised by Judge Geoghegan who was satisfied on the evidence before him that D was tending to become more socially isolated. Both parents had agreed that she presented as less of a bubbly personality than previously. The Judge further noted Mr Higgs' opinion that in terms of her personality D may fall within a small percentage of persons who may find difficulty relating to other people. Possible restrictions on social contact

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[57] At [36].

through belonging to a faith such as the Jehovah's Witness faith, which places restrictions on social contact, was described by Mr Higgs as a "double whammy".[58]

[103] While, for whatever reason, the appellant would be pleased to see the children spend less time in Jehovah's Witness activities, it is my perception that the variation which is sought to the parenting order is, at least in material part, influenced by a desire to achieve a greater degree of balance in the children's activities.

[104] When it was put to him by Ms Brown that from the children's perspective Jehovah forms a big part of their lives he said:

> A. … yes, you're right and that's what I'm trying to address I think here is the fact that there is so much of their life with Mum around Jehovah and I believe it's at the expense of quality things in other areas and I'm trying to get a balance. I believe the balance is what's missing in all this and I don't know how to get it back. That's why I guess I'm here. …

[105] When asked whether he thought that getting a Court order in the nature of the guardianship directions sought was going to stop the children believing in Jehovah immediately he responded:

> A. Well not, not immediately but I'm hopeful that what we'll do is that it will give them a chance to grow. It will give them a chance to finish off exercises that they started e.g. we might get out to some Cub camps for example, we might be able to get out on some music lessons for [D], we might be able to get a bit of balance back in their life. They might be able to get some perspective. We'll buy some time in terms of getting them some mental maturity so that they can see the consequences of the decision that's being forced upon them and not necessarily made by themselves.

In his updating affidavit he had made the point (following the paragraph quoted at [66] above) that the children had missed all four Cubs camps as a consequence of their being with the respondent on the camp weekends.

[106] The appellant's proposal found a degree of support in the submissions of Ms Brown. As she put it:

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[58] At [43].

> I think that there is not enough balance [in] the children's social time with their father because of the length of time of weekends that they are in Mum's care excluding them from non-Jehovah friends and from other sports and attending birthday parties with friends from school and things like that. I think that does negatively impact on them arguably. I would potentially see there being some merit in shuffling around some of those weekends so Dad has more social time and they have more time to do things like Cub camps. Birthday parties with friends from school is important and they, most of those do take place on the weekend because they're just a huge sugar fest and no one wants to do that on a school night so they do miss that socialisation factor and I think the Cubs thing is important.

[107] Mr Higgs also favoured more balance in the allocation of weekend contact although, as discussed below in the context of guardianship directions, presumably reflecting his "double whammy" analysis, his focus was more on the dilution of the children's exposure to the intensity of the Jehovah's Witness faith.

[108] In my view the evidence, in particular the updating evidence, and the submissions of counsel for the children provide a strong basis for an amendment to the parenting order whereby the children would be in their mother's care on every alternate weekend instead of for two weekends out of three. I consider that an appropriate amendment would be to substitute for order (a)(i) in [4] above the following:

> (i) Each alternate weekend from Friday after school to Monday morning before school.

[109] Save for that amendment, the application for the revised parenting order in [8] above is declined. In so holding, I expressly reject the argument that the parenting order is a shared-care arrangement. It is important in my view that the respondent should have mid-week contact with the children. I do not accept the contention that the Wednesday afternoon contact should be deemed to be a "respondent's night". The fifth ground of appeal is dismissed.

[110] However the guardianship directions discussed below will have implications for the periods of time during which the children are to be in their mother's care in the event that during the periods specified in (a)(i)-(v) she chooses to participate in Jehovah's Witness activities including attending the Kingdom Hall and witnessing.

[111] She is of course at liberty to attend Jehovah's Witness activities whenever she chooses. However it would be unfair and unhelpful for the children if, during periods when they are in her care, she were to leave them, albeit in the care of others, and attend Jehovah's Witness activities. That would likely be frustrating for the children knowing that their mother was participating in activities from which the children were excluded. It would also be awkward for the respondent and could cause some friction in her relationship with the children.

[112] Consequently the parenting order is further amended to provide that if, during any period while the children are in their mother's care, the respondent decides to attend at the Kingdom Hall or to participate in witnessing or to engage away from her home in any other activity of the Jehovah's Witness faith, then she is to first return, or arrange for the return of, the children into their father's care where the children are to remain until the next scheduled period of the respondent's care.

Does the Court have jurisdiction to make guardianship directions inconsistent with NZBORA rights?

[113] The "welfare and best interests" standard is not a subjective test based explicitly on the intelligence and maturity of the child to make decisions for himself or herself. It is assessed from the perspective of the court. As Tipping J observed in *Kacem v Bashir*:[59]

> [35] ... The judge's task is to determine and evaluate the facts, considering all relevant s 5 principles and other factors, and then to make a judgment as to what course of action will best reflect the welfare and best interests of the children. While that judgment may be difficult to make on the facts of individual cases, its making is not assisted by imposing a gloss on the statutory scheme.

[114] There is the potential for a conflict between what a judge might determine objectively is in a child's best interests and the child's own views. That potential divergence of views was explored in Ms Brown's submissions directed to the core question: can the ordinary application of the COCA result in outcomes which are inconsistent with the rights of children under the NZBORA?

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[59] *Kacem v Bashir*, above n 10, at [35].

Argument of counsel for the children

[115] Observing that previous cases have proceeded on the footing that children must comply with the will of their parents and orders of the Court, Ms Brown contends that the current case poses the question:

> What is the jurisdiction of the Family Court to bind children under orders contrary to (or even in support of) their firmly held expressed NZBORA stance if they are considered competent to hold such views?

[116] She argued that in passing the COCA Parliament had failed to have regard to a child's separate rights to self-determine under the NZBORA. In a COCA framework the only "views" of a child to be taken into account were as a result of parental applications to the Court and no consideration was given to the question how children (as distinct from their parents) could be bound by court orders.

[117] With her submissions for the June hearing she submitted an opinion from Professor Mark Henaghan of the Faculty of Law at the University of Otago addressing various aspects of a child's right to manifest religious freedom. By way of introduction the opinion noted that:

(a) Sections 13 and 15 of NZBORA do not contain any limitation in terms of a person's age;

(b) Consequently, children aged six and eight have the same rights as anybody else;

(c) While the children are the subject of this appeal, they are not parties to it;

(d) Section 3(a) of the NZBORA provides that the NZBORA applies to acts of the judicial branch of the Government of New Zealand; and

(e) If the rights in ss 13 and 15 are to be given their full force then a Court order that impacted on those rights would be in breach of NZBORA.

[118] Then, in responding to the question, whether it is demonstrably justifiable in a free and democratic society to place limits on the rights of children aged six and eight to manifest and express their religious beliefs, the fundamental proposition which emerged from the Professor's analysis was:

> Unless there is clear evidence that the children in this case do not have sufficient intelligence and understanding about their religious faith and unless there is clear evidence their choice of this faith will engender harm to these children, the courts should not restrict the right of these children to practise their choice of religion.

[119] Largely adopting those views it was Ms Brown's submission that, while it may be appropriate in the context of s 48 parenting orders for a child's "welfare and best interests" to be considered paramount, nevertheless under s 46R the Court should put first the child's views since such views should not lightly be interfered with because of the child's NZBORA rights. It was her contention that, in the face of a child's strongly held views, an order under s 46R would be clearly inconsistent with the child's NZBORA rights and freedoms.

[120] In an endeavour to do justice to Ms Brown's careful and comprehensive argument I annex to this judgment the flowchart which accompanied her further submissions of 17 October 2014 in response to those of the Attorney-General.

Argument of counsel for the Attorney-General

[121] Ms Coleman prefaced her submissions by noting that:

(a) Relevant sections of the COCA governing guardianship orders form a code which centres on the paramountcy principle;

(b) The fact that the paramountcy principle is judicially determined, with the Court in most cases being required to balance a range of different factors, suggests that there may be a dissonance between what a Judge could determine is in a child's welfare and best interests on the one hand and the child's exercise of rights and freedoms under the NZBORA on the other.

[122] In a useful summary of the Attorney-General's response to Ms Brown's submissions Ms Coleman advanced what she described as both a simple answer and a more complex answer.

[123] The simple answer is that, even if the application of the "welfare and best interests" standard could result in outcomes which were unjustifiably inconsistent with children's rights (which was not accepted), the court could not decline to make orders, which it would otherwise make in the best interests of the child, by reason only of the inconsistency. Section 4 of NZBORA would prevail.

[124] The more complex answer comprised two propositions. First, to the extent that a judicial determination of welfare and best interests can result in an order which is apparently inconsistent with a child's rights, any inconsistency would be prescribed by law and reasonable and demonstrably justified, being imposed following a judicial determination of the child's welfare and best interests and giving the child's views sufficient weight commensurate with the child's maturity.

[125] However secondly, when the "welfare and best interests" standard is properly interpreted,[60] there is no dissonance in practice between what a Judge will determine is in a child's best interests and that child's exercise of fundamental rights. The reason is that the "welfare and best interests" standard requires the Court to give sufficient weight to the child's expression of views, consistent with the child's maturity. Where a child demonstrates sufficient maturity to be independently exercising fundamental rights, the child's views will carry determinative weight.

Discussion

[126] I find a useful starting point in the Attorney-General's suggested ordinary meaning of the legislation:

> 48. The Attorney-General submits that, the more the evidence demonstrates a child's intelligence and maturity has developed such [that] he or she is able to make an autonomous decision on the matter in question, the more weight a judge must give to those views

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[60] Consistent with ordinary principles of statutory interpretation (text, scheme, purpose and the presumption of consistency with international law), bolstered by reference to s 6 of the NZBORA.

> as reflective of what is in that child's "welfare and best interests in his or her particular circumstances". The child's input becomes increasingly determinative as the child matures, to the point where, if the court is persuaded the child is sufficiently mature to make independent decisions, his or her views become determinative. Counsel adopts the observations of Abella J for the majority of the Supreme Court of Canada in *A.C. v Manitoba (Director of Child and Family Services)*:
>
> > The more a court is satisfied that a child is capable of making a mature, independent decision on his or her own behalf, the greater the weight that will be given to his or her views when a court is exercising its discretion under s. 25(8). In some cases, courts will inevitably be so convinced of a child's maturity that the principles of welfare and autonomy will collapse altogether and the child's wishes will become the controlling factor. If, after a careful and sophisticated analysis of the young person's ability to exercise mature, independent judgment, the court is persuaded that the necessary level of maturity exists, it seems to me necessarily to follow that the adolescent's views ought to be respected.
> >
> > When applied to adolescents, therefore, the "best interests" standard must be interpreted in a way that reflects and addresses an adolescent's evolving capacities for autonomous decision-making. It is not only an option for the court to treat the child's views as an increasingly determinative factor as his or her maturity increases, *it is, by definition, in a child's best interests to respect and promote his or her autonomy to the extent that his maturity dictates*.
> >
> > [emphasis added].

[127] In the context of an appropriately mature child, it did appear that Ms Brown and Ms Coleman found common ground. Thus in response to the Attorney-General's submission:

> 80. [The standard] requires children's views to be assessed and given a weight commensurate with their demonstrated maturity. This means that, in almost all cases where the child has demonstrated such maturity and is exercising fundamental rights, the orders will follow. It would only be in exceptional cases, such as where the child's autonomous decision-making and exercise of rights would endanger his or her safety, that the significance of the fact the child is exercising rights would be overridden. ...

Ms Brown observed that that appeared to agree with her fundamental contention, namely:

> If the children have maturity enough for a view on the question and there is no safety issue, they have rights.

[128] It will be recalled that the question which Ms Brown posed[61] assumed that the children were "considered competent to hold such views". Similarly the first qualification in Professor Henaghan's fundamental proposition was that the children would have sufficient intelligence and understanding about their religious faith.[62] As noted below in my consideration of the assessment of the emotional maturity of D and S, it was the contention of both Ms Brown and the Professor that these children were *Gillick*-competent.

[129] But what if a child lacks the emotional maturity referred to by Lord Scarman in his much quoted passage in *Gillick*:[63]

> The underlying principle of the law was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.

[130] In Ms Kershaw's submission the short response is that where a child is not *Gillick*-competent to exercise NZBORA rights, then those rights are not engaged and consequently there can be no breach of such rights.

[131] While endorsing the speeches in *Gillick*, counsel for the Attorney-General emphasised that the question of capacity must be closely linked to the content of the relevant right said to be engaged in the particular case, that is, that the child must have capacity to exercise the particular rights said to be engaged.

[132] In my view there is much to commend the Attorney-General's analysis that, when the welfare and best interest standard is interpreted as to require a Court to give weight to the child's views commensurate with his or her demonstrated maturity, and when it is understood the children cannot be said to be exercising rights under NZBORA unless they have developed sufficient maturity to be said to be exercising rights under the Act, then ipso facto the Court cannot make orders which are inconsistent with children's rights.

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61 At [115]above.
62 At [118] above.
63 *Gillick*, above n 29, at 186.

[133] However Ms Coleman recognised that the Court might be hesitant to conclude categorically that, when interpreted as the Attorney-General contends, the welfare and best interests standard would never result in an apparent inconsistency with a child's rights. To the extent that such apparent inconsistencies might arise I agree with the Attorney-General's submission that such inconsistency would be prescribed by law, reasonable and demonstrably justified under s 5 NZBORA.

[134] It would be an outcome arrived at after judicial consideration of what would be in the child's welfare and best interests while taking into account and giving sufficient weight to the child's views and being cognisant of the fact that the order would be apparently inconsistent with his or her fundamental rights. Such a conclusion is consistent with other comparable jurisdictions which have recognised that a competent child's rights may be overridden by a judicial determination of what is in his or her best interests.[64]

Summary

[135] Only some of the extensive argument which I heard is traversed in the discussion above. While my preference is to confine my conclusions to the issue which it is necessary to determine at the present time, I am mindful of the fact that the history of this family suggests that further issues may arise in the future. I am also conscious that the effect of s 145(1)(a) is that the parties will not have the benefit of higher appellate consideration of the NZBORA issues.

[136] For those reasons and with an eye to assisting the parties and the children in the future I proffer the following succinct summary on the arguments presented to me:

(a) Until a child attains *Gillick* competence relative to the particular right in question such that the child is able to make an autonomous decision concerning the exercise of that right, a decision by a court under the COCA on the grounds of the welfare and best interests of the child will not be inconsistent with the child's NZBORA rights. The child's

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64 *An NHS Foundation Trust v A* [2014] EWHC 920 (Fam) at [12]; *X v The Sydney Children's Hospitals Network* [2013] NSWCA 320.

views concerning the exercise of the child's NZBORA rights, will be appropriately reflected in the Court taking into account the child's views pursuant to s 6(2). It is not a prerequisite to the Court overriding the child's wishes that harm would likely ensue for the child.[65]

(b) In most cases where a child attains *Gillick*-competence the child's exercise of his or her NZBORA rights will be determinative because "the principles of welfare and autonomy will collapse altogether and the child's wishes will become the controlling factor".[66]

(c) Non-exclusive exceptions to (b) include specific statutory exceptions,[67] or where the exercise of the right would likely result in physical or emotional harm to the child.

(d) To the extent that the Court's application of the welfare and best interests standard under the COCA resulted in an inconsistency with a child's NZBORA rights such inconsistency would be prescribed by law, reasonable and demonstrably justified under s 5 of the NZBORA.

(e) In any event the effect of s 4 of the NZBORA is that the Court could not decline to make an order under the COCA in relation to the guardianship and care of a child which would be in the child's welfare and best interests by reason only that such was inconsistent with any provision of the NZBORA.

Jurisdiction in this case: Are D and S *Gillick*-competent?

[137] As noted above, the question of capacity is closely linked to the content of the relevant right said to be engaged. Relevant to the present matter a child can be said to be exercising rights under s 13 where he or she has developed sufficient maturity to be said to be holding "religious" beliefs or views on matters of

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65 L'Heureux-Dube J in *Young v Young*, above n 44 at 8.
66 *AC v Manitoba (Director of Child and Family Services)* cited at [126] above.
67 Care of Children Act 2004, ss 36-38.

"conscience". Similarly under s 15 a child will be exercising rights where he or she can be said to be manifesting those beliefs in "worship, observance, practice or teaching".

[138] Ms Brown's position, as reflected in the conclusion to her further written submissions for the October hearing, was that both D and S understood what Ms Brown described as the two important matters in question namely:

(a) Whether the children should be allowed to believe in and worship Jehovah; and

(b) How the children should manifest that belief and conduct themselves to abide by the religious direction.

Her contention as I heard it was that the children understood that to be a meaningful member of the Jehovah's Witness faith one simply had to follow the rules of the faith. She submitted that the decision to elect to follow the rules was a fairly straightforward decision which these children are competent to make at their present ages. That approach was reflected in her question to Mr Higgs:

> Q. Doesn't [D] deserve, on face value, to have her choices upheld and for discussion later about what the merits of those might be?

[139] Mr Higgs had earlier stated in response to Ms Kershaw that he did not consider that the children were developmentally old enough to be making choices to be part of a religious faith. He explained that while D would be able now to understand logic, it would not be until at least early adolescence (about the age of 12 plus or minus a year depending on the child) that a child can conceptualise fully and be able to debate the pros and cons.

[140] The nature and import of the developmental process was conveniently described by Baroness Hale of Richmond in *R (SB) v Governors of Denbigh High School*:[68]

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[68] *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 (HL) at [93].

93. Important physical, cognitive and psychological developments take place during adolescence. Adolescence begins with the onset of puberty; from puberty to adulthood, the "capacity to acquire and utilise knowledge reaches its peak efficiency"; and the capacity for formal operational thought is the forerunner to developing the capacity to make autonomous moral judgments. Obviously, these developments happen at different times and at different rates for different people. But it is not at all surprising to find adolescents making different moral judgments from those of their parents. It is part of growing up.

[141] In response to Ms Brown's question above, Mr Higgs said:

A. Yes I don't disagree with that. I think the point was whether she's at an age where she can make a, a reasonable, intelligent decision about such matters and my view would be, based on child development literature, would be that she's not of an age where she can do that. So she will follow what her parents want and then she'll, when she reaches a certain age she will begin to question and she may decide to continue or she may decide not to continue.

[142] The distinction which he drew between D and S was helpfully explained in his answers to questions from Ms Brown on the Keas theme previously referred to.[69]

Q. You would [expect] that [D] would have a better comprehension of Jehovah's expectations on her because of her higher range of reading ability, for example, than [S] would?

A. Yes, you would expect that.

Q. And yet [S] was the one who stated very clearly to me that Keas teaches us false religion as opposed to [D] who was totally thrilled about participating in Keas and could see nothing negative about it. Can you explain –

A. Yes.

Q. - their differences in perception there?

A. Yes. I think, that's an interesting difference actually and I think it's because [S] is younger and therefore he's adopting the rules and views of the Jehovah's Witness faith in a very concrete fashion. So anything that doesn't – he hasn't got that – [D's] even developing a sort of a tolerance for ambiguity around that but [S] hasn't got that so what he's taught is what he believes so when somebody says something different he finds it had to accept that because it doesn't fit his framework of what he believes so his views are more concrete.

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[69] At [71] above.

Q. So surely [D's] tolerance for ambiguity that you've just stated is a different, shows itself in quite a significantly different maturity level to [S]?

A. It does.

Q. Firstly?

A. Yes.

Q. And it also shows that she has weighed up the consequences of compliance or not compliance and how it should impact on her daily decisions?

A. Yes, but weighed up in the sense of, it's what's known as horizontal reasoning I think, it's got to do with she can weigh up the pros and cons of doing what she wants or doesn't want, what would please Jehovah and what wouldn't as opposed to we were talking earlier about whether she's able to analyse the pros and cons of the existence of Jehovah or the believing in the Jehovah and so forth.

[143] I do not consider that Ms Brown's bifurcated analysis[70] is apt for the assessment of a child's capacity to engage with religion. As McLachlin CJ remarked in *Alberta v Hutterian Brethren of Wilson Colony* religion is a matter of faith, intermingled with culture: it is individual, yet profoundly communitarian.[71] It may touch many facets of daily life.

[144] A helpful definition of "religion" was offered by Iacobucci J in *Syndicat Northcrest v Amselem* for the purposes of s 2(a) of the Canadian Charter:[72]

> ... Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.
>
> What then is the definition and content of an individual's protected right to religious freedom under the Quebec (or the Canadian) *Charter*? This Court has long articulated an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom. ...
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> ... in *R. v Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759, Dickson C.J. stated that the

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70 At [138] above.

71 *Alberta v Hutterian Brethren of Wilson Colony* 2009 SCC 37, [2009] 2 SCR 567 at [89]-[90].

72 *Syndicat Northcrest v Amselem* [2004] SCC 47, [2004] 2 SCR 551 at [39].

> purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. [Emphasis added].
>
> This understanding is consistent with a personal or subjective conception of freedom of religion, one that is integrally linked with an individual's self-definition and fulfilment and is a function of personal autonomy and choice, elements which undergird the right;

[145] With that concept of religion in mind I reject the proposition that *Gillick*-competence can be applied in a staged manner, with an initial decision to commit to religion while consideration of the merits of such decision are postponed to a later stage in a child's development.

[146] Judge Geoghegan's overall assessment was that it was unlikely the children were at a developmental stage where they were able to make an informed choice about their inclusion in religion and the merits or otherwise of that inclusion.[73] Having heard the evidence of Mr Higgs, considered the views conveyed by the children to Ms Brown and met twice with the children myself, my view accords entirely with that of Judge Geoghegan. The children are not yet *Gillick*-competent.

Should any of the guardianship directions sought be made?

[147] The appellant and respondent found common ground in their criticism of the judgment for the omission to make guardianship directions concerning the religious instruction of the children. Ms Kershaw emphasised the requirement in s 16(5) that the guardians of children must act jointly.[74] Where that is not possible then, in her submission, it is incumbent on the Court under s 46R, to make a guardianship direction.

[148] The parties were unanimous in their submission that it was necessary for the Court to make guardianship directions to clarify the situation for them and for the children. Mr Ron cited as directly applicable to this appeal the reasoning from Judge Binns in *L v M*:[75]

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73 At [29].
74 At [40] above.
75 *L v M*, above n 42, at [100].

> [100] ... a clear and unequivocal direction is required in order to avoid or at least minimise future inter-parental disputes about Ms M's involvement of the children in her religion. If the dispute continues unresolved there are likely to be detrimental effects on the children due to their awareness of each of their parents' views and divided loyalties or feelings of guilt from being drawn into the dispute by their parents;

[149] As with my consideration of the parenting order, likewise in relation to potential guardianship directions I have regard to the s 5 principles.[76] I am also mindful of the point made by Rex Ahdar that, if there is one axiom in the custody and access cases involving disputes over religion, it is that the law must remain strictly neutral on matters of religion.[77] He drew attention to the eloquent observation of the Full Family Court of Australia in *In the marriage of Paisio (No 2)*:[78]

> ... the courts have recognised that it is not part of the judicial function to rule that one form of religion is to be preferred to any other. There may be many paths to the top of the mountain. Some would say that there is only one. Some would say there is no path. Some would say there is no mountain. It would be presumptuous, vain and temerarious for a judge to make a finding of fact on such an issue.

[150] Ahdar makes the point that the need to focus on the particulars of the instant case is especially critical in disputes involving religion. He suggests that the entire exercise is in danger of rapidly degenerating into a trial of religion if the concrete circumstances are overlooked and instead the Court examines in an abstract way whether the upbringing in the religion at issue is in a child's best interests.

[151] In deciding that there should be no prohibition on the children's participation in the Jehovah's Witness faith Judge Geoghegan was influenced by two matters: the children's right to be exposed to each of their parents' religious beliefs; and the view that the care arrangement would have the effect of lessening the concerns about alleged indoctrination in the respondent's religion.

[152] I agree with the Judge at [54] that the children have the right to be exposed to each of their parents' religious beliefs. I also share the Judge's view at [55] that it

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76 At [97].

77 Rex Ahdar "Religion as a factor in custody and access disputes" (1996) 10 International Journal of Law, Policy and the Family at 178.

78 *In the marriage of Paisio (No 2)* (1978) 5 FAM LR 281 (Full Fam Ct) at 283.

would be artificial and impractical to endeavour to prevent their involvement in their mother's faith. Indeed, in my view it would be both counter-productive and possibly destructive to order otherwise.

[153] Where I part company with the Judge is on the issue of whether (and if so how) steps might be taken to lessen the impact on the children of their involvement in the Jehovah's Witness faith. The Judge considered at [54] that the parenting order he crafted would have the effect of lessening the express concerns about the children's alleged "indoctrination" although at [55] he appeared to contemplate that such lessening might be theoretical only.

[154] Although I do not consider (and nor apparently did the Judge) that a parenting order should be structured for the primary purpose of addressing, and in particular modifying, the influence of religious affiliation, I do not share the Judge's assessment that the collateral effect of the parenting order was as he appeared to anticipate.

[155] The evidence suggested to me that, no matter how much or little time the children may be in the respondent's care, the real cause for concern, and the underlying generator of the dissonance which the children encounter, is the intensity of instruction which they appear to receive as a consequence of their level of participation in the Jehovah's Witness faith.

[156] On this issue I found the analysis of Mr Higgs to be informative. He expressed concern about the level of intensity of the children's instruction in the Jehovah's Witness faith and he clearly favoured a diluted participation. In response to my question directed at the periods of time spent by the children with each parent he said:

> A. I think the time is reasonably balanced in terms of the order, I think that the intensity of their education, I don't know what else to call it Sir, but their exposure to their mother's faith is intense during the time that they're with their mother and I think that actually creates a greater weight in terms of influence on the children. The children might be with their father more often but the activities there are more general and they're probably more varied so in that sense I think that to take away completely, if that was even possible, the children from attending their mother's faith, that would be extreme

but to dilute it somewhat in my opinion might create a better balance from a quality point of view for the children.

[157] The issue of better balance was also addressed in the course of his being questioned by Ms Kershaw:

Q. … Would a better balance for [D] and [S] be if when they were in their mother's home they were spending less time on activities like witnessing, the Kingdom Hall and Bible study and more time doing other activities with their mother that didn't include the Jehovah's Witness faith?

A. That would be a more ideal situation in my view.

Q. Would that help to some extent to help counter the rapid internalisation of the views of their mother?

A. Yes.

[158] While the notion of rapidity was incorporated into the question, it was evident that Mr Higgs himself recognised that there was a degree of urgency in addressing the situation, as demonstrated from the following exchange with Ms Kershaw:

Q. Now in your evidence in the last hearing I think you used the word, "malleable" in respect of [D]?

A. Yes.

Q. That she's still at that point, is it still possible for [D] to change her views at this point or to find a better balance in her views?

A. I think it's possible for her to find a better balance in her views but the fuse is running short.

Q. So by the fuse [is] running short do you mean that the window is quickly closing whereby something can be done about this?

A. Yes.

Q. And it may be that quite a clear and strong approach is needed at this point otherwise we're at the point of no return?

A. Yes, but that clear and strong approach, if that was to occur is going to cause her some anxiety because it's going to come up against her beliefs and so that would have to be carefully managed by the parents.

[159] In her written submissions for the June hearing Ms Brown indicated that her primary concern was with the implications for the children's longer term development resulting from such extended periods of dissonance and anxiety. She postulated that that could include avoidance of conflict by disengaging in the daily challenges of our wider society or perhaps even leading to an inability to "platform" arguments in later life on general issues because of a learned behaviour of withdrawal from conflict situations. It was her perception that the situation for the children was so intractable that they did not feel able to discuss or even attempt to resolve it.

[160] To my question about the relative degree of influence of the respondent and external influences Mr Higgs said:

> A. I think in the first instance it's the influence of the mother but I think there's a very strong peer pressure if you like from Jehovah Witness members who I think there's quite a lot of visiting between members and discussions and bible readings and so forth that take place. I think it's not just the mother's influence. There's a broader influence.

In an exchange with Ms Brown he made a similar point, observing that when with their mother it is the totality of the exposure to other people with the same views and in other activities all revolving around the Jehovah's Witness beliefs.

[161] When I raised with him the issue whether directions of the nature of the interim orders earlier in place could provide a practical limitation, he volunteered the suggestion that to dilute the influence would probably require an increase of weekend time by the children with their father and a rearrangement of the weekdays. In that way the influence might be diluted because the children would be available to take part more frequently in activities other than Jehovah's Witness activities. He agreed with Ms Kershaw's proposition that scaling back on the Jehovah's Witness involvement was perhaps the only way to really resolve the cognitive dissonance to which he had referred in his most recent report.

[162] It is only proper that I should record that Mr Higgs explained that he had tried to keep religious views out of his consideration and to just speak about "values". However the practical difficulty was that one of the "values" appeared to be to limit

association with people who are not Jehovah's Witness and observance of that value would limit the children's ability to participate in the wider world.

[163] The evidence satisfies me that this case is one which requires a guardianship direction similar in structure to that in *S v N*[79] and similar in outcome to *Young*.[80] I refer to *Young* because, although the order prohibiting the father from discussing the Jehovah's Witness faith with his children was set aside, the father had since the trial given an undertaking that the children would not accompany him in religious activities such as services or his evangelical efforts without consent from their mother.

[164] Consequently I consider it necessary to make a guardianship direction of the nature of (a) in [9] above, namely that the children should not attend Jehovah's Witness meetings or church activities including seminars or witnessing. I recognise that such a direction is at odds with the children's express wishes. Nevertheless the evidence persuades me that their welfare and best interests require that there should be a dilution in the intensity of their exposure to their mother's faith.

[165] However I do not consider that it is appropriate to make an order in terms of (b) which would preclude the respondent engaging with the children about the Jehovah's Witness faith. The children have the right to be exposed to her religious beliefs. Their views, albeit heavily influenced by their mother, but nevertheless genuinely held, align with a guardianship direction that they should be able to engage with her in the study of her faith. Consequently there will be a further guardianship direction that affirmatively states that the children can engage in bible study, watch videos and read passages from the Watchtower while with their mother on her own in her home.

Orders

[166] The parenting order dated 24 March 2014 is set aside and replaced with an order under s 48 in the following terms:

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79 At [65] above.
80 At [64] above.

(a) The children are to be in their mother's care at the following times:

(i) Every alternate weekend from Friday after school to Monday morning before school;

(ii) Every Wednesday evening from after school to 7.00 pm.;

(iii) For the first half of each school term holidays from 4.00 pm on the day the school term finishes to 4.00 pm the following Friday;

(iv) Each alternate week during the Christmas school holidays commencing at 4.00 pm Boxing Day in each year;

(v) During the holiday periods in (iii) and (iv), the directions in (i) and (ii) do not apply; and

(vi) At other times as agreed.

(b) The children are to be in the care of their father at all other times.

(c) If during any period while the children are in their mother's care she chooses to attend at the Kingdom Hall, participate in witnessing or engage in any other activity of the Jehovah's Witness faith, she is to first return, or to arrange for the return of, the children to their father and the children will then remain in his care until the next scheduled period of the respondent's care.

[167] The following guardianship directions are made pursuant to s 46R:

(a) The children can be involved with and exposed to the Jehovah's Witness faith with their mother (while on her own with the children) at her home. For the avoidance of doubt such exposure may include bible study, watching videos and the reading of passages from the Watchtower; and

(b) The children shall not attend Jehovah's Witness meetings or church activities (including at the Kingdom Hall). Nor shall they participate in seminars (including conventions) or witnessing.

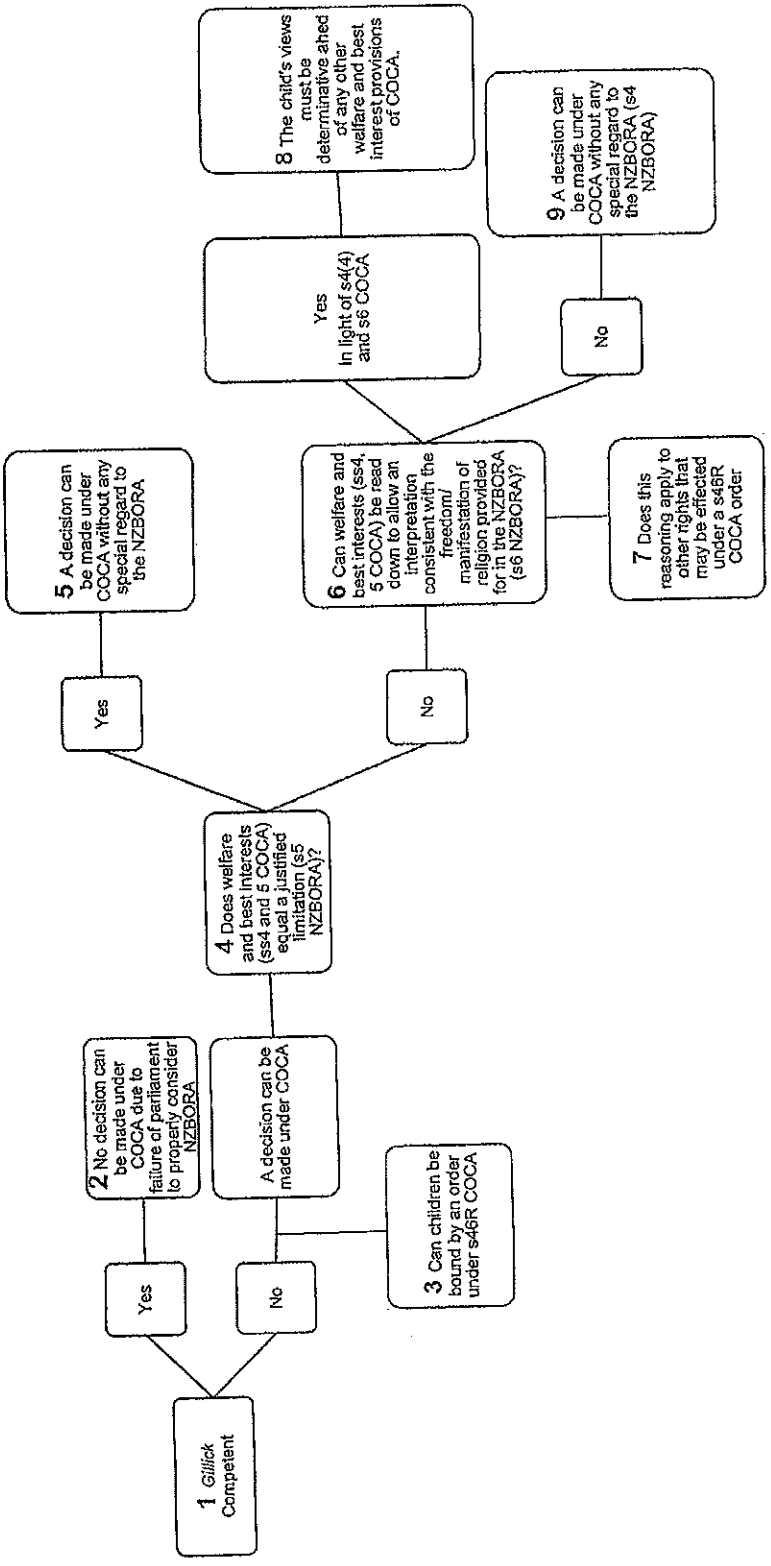
(c) That the children not be excluded from any school or extracurricular activities on the basis of religion, to include the Cool Bananas religious programme in school, school productions, school camps, sports, and any other extracurricular activities; and

(d) That the children be permitted to attend birthday, Easter and Christmas celebrations whilst in the appellant's care.

[168] Leave is reserved to the parties and to counsel for the children to raise with me any issues concerning the practical implementation of the orders and directions in this judgment. Of course such leave does not extend to relitigating the substance of the orders or directions.

Brown J

ANNEXURE


1 Gillick Competent
2 No decision can be made under COCA due to failure of parliament to properly consider NZBORA
Yes
A decision can be made under COCA
No
3 Can children be bound by an order under s46R COCA
4 Does welfare and best interests (ss4 and 5 COCA) equal a justified limitation (s5 NZBORA)?
5 A decision can be made under COCA without any special regard to the NZBORA
Yes
6 Can welfare and best interests (ss4, 5 COCA) be read down to allow an interpretation consistent with the freedom/ manifestation of religion provided for in the NZBORA (s6 NZBORA)?
No
7 Does this reasoning apply to other rights that may be effected under a s46R COCA order
8 The child's views must be determinative ahed of any other welfare and best interest provisions of COCA.
Yes
In light of s4(4) and s6 COCA
9 A decision can be made under COCA without any special regard to the NZBORA (s4 NZBORA)
No