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

**NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.**

**IN THE FAMILY COURT**
**AT PALMERSTON NORTH**

**FAM-2014-054-217**
**[2016] NZFC 3993**

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| IN THE MATTER OF | THE CARE OF CHILDREN ACT 2004 |
| BETWEEN | SOPHIE STANFORD<br>Applicant |
| AND | SIMON SMALLS<br>Respondent |

Appearances: Ms Freeman Counsel for the father
Mr Delaney Counsel for the mother
Mr Logie Counsel for the children

Judgment: 17 May 2016

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**RESERVED DECISION OF JUDGE J F MOSS**
**[As to power to rescind and interim contact]**

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[1] The parties of the parents of Warren and Lou who are 10, (born [date deleted] 2005) and eight (born [date deleted] 2007). Their parents have lived apart since 2010, and the children have lived with the mother through that time. The mother resides in Palmerston North and the father out of [location deleted]. In 2014 the mother sought and obtained a parenting order.

[2] On 14 April 2016 she obtained without notice an order varying the contact provision in the existing parenting order and requiring that contact would be

supervised. The Court's order requires supervision by a person approved by the Court.

[3] A week later the father applied to rescind that order relying on Rule 34 Family Court Rules. The Court's order was made pursuant to s 46 Care of Children Act. The application under The Care of Children Act falls to be determined by procedures in part 5A Family Court Rules. These procedures were regulated and came into force on 1 April 2014, and aimed to standardise Court process, and to limit legal representation, limit extensive elongated litigation, and provide a practical guide to parents to enable them to understand Court process. Other general parts of the Family Court Rules were excluded in relation to Care of Children Applications (other than Hague Convention Proceedings). The general power to make an application without notice was excluded, and a specific power included in Rule 416J. The general power to apply to rescind an order made without notice appears at Rule 34, and is in Part 2 of the Rules which, by Rule 416A, is excluded from application to COCA proceedings.

[4] Rule 416J which enables applications to be made without notice, follows substantially the test contained in Rule 24(2)(a)(1). To this extent, Rule 416J does not amend the Court's previous power to act without notice.

[5] Rule 416J requires that if an order is made the matter must proceed to a hearing (Rule 416U). There are other provisions in relation to placing the matter on notice when making the final order. The power which is not specifically included is an option for a respondent to apply to rescind. Rule 34 contains the general power to apply to rescind where an application is made without notice. This Rule sits in Part 2 of the Rules, and on the face of the Rules, is excluded from application in respect of Care of Children Act applications made without notice (unless Hague proceedings).

[6] Rule 34 reads:

> **34 Orders made on applications without notice**
>
> If an application without notice is made, and an order is made on the application,—

(a) the Registrar must, if the applicant was not present at the hearing of the application, make a copy of the order available to the applicant without delay:

(b) a copy of the order must, under rule 101 (documents to be served), be served on every person against whom the order is made:

(c) each person against whom the order is made may, at any time, make an interlocutory application to a Judge to have the order varied or rescinded.

[7] Also relevant in the resolution of the question of whether the Court has jurisdiction to entertain the application of the father to rescind are the Rules in Part 1 (which do apply to COCA proceedings), and specifically Rules 13 – 16. For completeness it is necessary to consider these Rules as a group. They read as follows.

**13 Practices must be consistent**

(1) A practice that is not consistent with these rules or a family law Act must not be followed in any court.

(2) Subclause (1) overrides rules 14 to 16.

**14 Directions in case of doubt**

(1) A person in doubt about any matter of procedure under these rules may make an interlocutory application without notice to the Judge for directions, and the Judge may make a decision and give directions on that matter.

(2) If there is a doubt about the application of a rule to any proceedings, the Judge may make a decision and give directions—

(a) on an interlocutory application without notice for the purpose by a person; or

(b) on the Judge's own initiative.

(3) A step taken in accordance with directions under this rule is in accordance with these rules.

(4) This rule is subject to rule 13(1).

**15 Matters not expressly provided for in rules**

(1) The Judge must deal with any matter not provided for by any enactment (including any of these rules)—

(a) under provisions of these rules dealing with similar matters if that can be done; or

(b) in a way decided by the Judge, in the light of the purpose of these rules, if the Judge considers the matter cannot be dealt with under provisions of these rules dealing with similar matters.

(2) This rule is subject to rule 13(1).

**16 Judges may give directions to regulate court's business**

(1) The Judge presiding over a court may, at any time, give any directions he or she thinks proper for regulating the court's business.

(2) This rule is subject to rule 13(1).

[8] The primary authority which the Court relies on as defining the test which must be met before the Court's jurisdiction to act without notice can be satisfied appears in *Martin v Ryan*[1]. In that case the Court decided there must be five matters satisfied before orders can be made without notice these are:

1. There must be a clear case on the merits.

2. The delay which would be caused by proceeding on notice might entail irreparable injury.

3. There must be no delay by the applicant.

4. The effect of an order would be only brief and provisional.

5. There must be strong grounds for overriding the conventional requirements of natural justice.

The Court was considering a Relationship Property Matter, for which the without notice threshold is irreparable injury. Subject to that limitation, these principles are widely accepted as the decision process for accepting a without notice application. In *K v C*[2] the High Court considered Domestic Violence Act proceedings, and,

[1] *Martin v Ryan* Fisher J 1990 2 NZLR 1209
[2] *KC* 2002 NZFLR 200

reiterating the *Martin v Ryan* principles, noted the importance of a careful and critical reading of evidence. In the Family Court *W v W* [3] Judge Inglis expressed it more firmly when said this:

> What is required is full disclosure that is absolutely honest; the facts exactly as they are, without any gloss or spin, without any strategic omissions or distortions or hidden advocacy. Plain, unvarnished and honest statements are verifiable and relevant to fact.

[9] This high standard is applied because of the inherent procedural unfairness in applying without notice.

[10] Ms Freeman submitted that the Court must approach the proposition that the power to apply to rescind is excluded under the rules with great caution. She submitted that so great is the incursion on the rights of litigants from the exclusion of the rescission right that it cannot have been intended.

[11] Mr Delaney and Mr Logie both relied on the plain exclusion of Rule 34 in submitting that the application to rescind could not be entertained.

[12] Mr Logie recorded real reluctance with assuming that proposition, and directly, also, submitted that the hearing convened for the rescission application could as well be regarded as a hearing set down under s 416J and s 416U. It is an attractive argument, but ultimately for the reasons below I am not satisfied that Rule 34 is excluded.

[13] Had the exclusion been intended, Rule 34 would likely have been amended. I accept the submission of Ms Freeman that an application under s 416J which leads to an interim order imposes such stricture on a person's right of access to the Court that it is unlikely to have been effected without specific exclusion. Thus, although Rule 34 is excluded by the plain operation of Rule 416A, in my view that exclusion creates a matter not expressly provided for in the Rules. It cannot have been intended that a person ruled against on without notice application is without remedy to render equivalent that person's access to the Court. I consider that this is a matter not provided for in the rules and thus Rule 15 applies. I consider that applying the

[3] *W v W* FC New Plymouth SP 043-001-01, 30 May 2001

practice in Rule 34 renders the procedure on without notice applications consistent among the Family Law acts. This complies with the Rule 13. Applying Rule 34 by use of Rule 15 is a consistent practice, as envisaged by Rule 13.

[14] I am satisfied, therefore, that the Rule 34 process is a consistent practice and can be entertained by the Court. Further, in my view, it is necessary that such a practice should be entertained by the Court where an application is made without notice, and where a party disadvantaged contends that the Court has acted on evidence which was incomplete or materially misleading.

[15] The mother's application summarised her concern that the children were in a distressed state as a result of the father's behaviour during contact and his approach to parenting matters, and his approach to the content of indirect contact with the children between visits. The application was filed on 14 April 201; two days after the younger child ([age details deleted]) took a knife out of the kitchen drawer and threatened suicide. In her long affidavit she explained a number of matters, but the material in part one fully summarises her worries. This reads:

> I am the children's mother.
>
> On 12 April 2016 Lou took a knife out of the kitchen drawer and threatened suicide.
>
> Warren is [details deleted] and a target for bullying at his current school. This has happened on a number of occasions and while I work through it I believe it is in his best interests to attend [name of school 1 deleted] commencing in 2017.
>
> The current Court Order has been breached a number of times, the most concerning of which is the Respondent (Simon) consistently telling the children they should live in [location deleted] with him.
>
> Simon does not support the children in their learning, sporting activities in Palmerston North or monitoring Warren's diet. Simon lives alone. When the children are in his care they eat fatty food, sugary drinks, watch inappropriate movies until late at night and ride their motor-cross bikes. Homework is not done.
>
> When they are returned to my care they are tired, angry, depressed and there is always two or three days when I have to re-establish routines. My view is that the children's difficulties are caused by the change in family culture and the loyalty conflict Simon creates by telling them they should be living in [location deleted].

[16] The reference to the breach of the order relates to a prohibition on discussion of adult issues. The later part of the affidavit also referred to the mother's concern that the father had provided inadequate supervision of the children as a result of which one of the children sustained a serious facial injury when [details of injury deleted]. The mother was highly critical in her affidavit that Lou was in the care of others at the time of the [injury], and it was those people who obtained the first medical care. The mother was critical that the father had not spoken to her about the incident, had not explained why he was not caring for Lou at the time, and that there was a delay in her learning about the injury.

[17] The mother was also critical that the father had enabled Lou to do highly active motor-cross when the surgeon who repaired Lou's face suggested he should not do so.

[18] When the father applied to rescind the order a week later, he provided an affidavit from himself and one from the family who was caring for Lou at the time of the [injury]. He provided a medical certificate from the surgeon who was caring for Lou. He provided email correspondence from the children's school. He explained one event in relation to inappropriate movies. He explained timing in relation to the children's punctuality at school.

[19] The text messages which the father sent referring to the children living in [location deleted] and living with him date from last year. This was not disclosed by the mother. The bullying of Warren at school did occur, but was taken in hand by the school, from the father's point of view, and did not continue after the early days of Term 1. The note from Lou's surgeon referred to his not undertaking sporting activities for three to four weeks after surgery. The school email correspondence records the teacher's considerable appreciation of the father's involvement in assisting with reading intervention before school on the Mondays when the father delivers the children to school.

[20] An examination of the school attendance records show that on five occasions the boys were late to school on a Monday when they had been in their father's care. Those occasions occurred in 2015.

[21] It appears in the evidence that there is a real dispute about where Warren will go to school next year. It also appears that both parents have talked to Warren about his school attendance before they have consulted one another. Although the mother accuses the father of doing this, and proposing that Warren attend [name of school 2 deleted], her evidence is clear that she had spoken to Warren about attending [name of school 1 deleted] prior to suggesting this to the father.

[22] The evidence in relation to discussion of living in [location deleted] is specific to last year, except that it appears the father has discussed with Warren attending [name of school 2 deleted].

[23] The intensity of the conflict between the parents' points of view about the issues of the boys' health, schooling, and lifestyle have intensified since the without notice application was made a month ago, and the application to rescind was filed. Careful reading of each of the parents' affidavits lead me to a conclusion that the argument between them is as much about interpretation and style as about substance. The father has acknowledged, and properly, that there was a period last year where he was not engaged in the schooling endeavours of the boys in the way he should have been.

[24] Sadly, what is absent from each parent's evidence, is an appreciation that they each contribute value to their sons.

[25] Applying the test in *Martin v Ryan*, I am not satisfied that this was a matter upon which without notice action was justified. The affidavit of the mother misled the Court in a number of ways, each small, but cumulatively large. In particular, I note: non disclosure of the timing of exhibited text messages, non disclosure of the resolution of the bullying of Warren resulting from the departure of the bullying child, non disclosure of the timing of school lateness, misleading assertions about the father's avoidance of engagement with the boys' school.

[26] In addition, the mother emphasised that the father was openly denigrating of her by email and text, but did not provide evidence of that. What evidence of email

exchange there is between the parents is relatively courteous. It is difficult to make sense of that aspect of the mother's allegations.

[27] I consider that taken as a whole, the mother's evidence was misleading. One can readily understand her extreme worry and distress at the events on 12 April, but the genesis of the boys behaviour is not clear, and in my view cannot more likely than not be assigned to difficulties in the father's household.

[28] I am satisfied that the father's application to rescind the order made on 14 April is well made. That order is now rescinded. The status quo ante is restored.

[29] However, it is clear that there needs to be change. The boys' membership of [sport deleted] teams needs to be resolved. It is not ideal that they are playing for two teams. However, they are used to that, and if the [sport deleted] clubs will enable their participation on this basis, that difficulty alone is not sufficient to depart, on a unilateral or on an urgent basis, from a settled existing care arrangement.

[30] Where parent dynamics are difficult, there is great risk for children in the court needing to make and implement decisions of this nature. It is human nature that where litigation is established to appear to create winners and losers that children's separate reactions will not be in the forefront of their parents' considerations. Sadly, however, this is the risk which these two boys face. Whether it is adverse to the boys will depend upon the parents' behaviour.

[31] The mother's application to vary the parenting order now must proceed on notice. Given the litigation to date, the matter is to be on the standard track complex case if only to ensure availability of more intensive court resources than would typically be the case. The issue relating to Warren's schooling needs to be advanced. There is to be a directions conference not before 1 August to enable the parents to have sufficient time to fully engage with the proposed therapeutic process. Mr Logie's appointment should remain in abeyance meantime to facilitate parental responsibility. In the event that either parent considers that an issue requires that the boys are represented, leave is reserved to apply on three days' notice. Mr Logie is asked to update the boys' views ahead of the directions conference in August and to

advice, from their perspective, whether there needs to be further evidence gathered, or whether the matter can then be set down for resolution.

**J F Moss**
Family Court Judge