

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

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

**IN THE FAMILY COURT  
AT NEW PLYMOUTH**

**FAM-2012-043-000120  
[2016] NZFC 4512**

IN THE MATTER OF      THE CARE OF CHILDREN ACT 2004

BETWEEN                CATH KING  
                                 Applicant

AND                      DAN FORBES  
                                 Respondent

**(On the papers)**

Judgment:              15 June 2016

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**JUDGMENT OF JUDGE G P BARKLE**  
**[as to costs]**

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[1] The applicant, Cath King (“Ms Forbes”) makes application for costs in respect of Care of Children Act proceedings involving her former partner, Dan Forbes (“Mr Forbes”). They are the parents of Wiremu Forbes (“Wiremu”) born [date deleted] 2007.

[2] A brief history of the proceedings is as follows:

- (a) The parties lived together in a de facto relationship from February 2004 until 31 January 2012.
- (b) The parties separated on 31 January 2012 as a result of an incident of domestic violence.
- (c) Ms King obtained a temporary protection order on 20 February 2012. Mr Forbes did not oppose the application for a protection order and an order was made on 21 May 2012.
- (d) Ms King also obtained an interim parenting order on 20 February 2012 granting her day-to-day care of Wiremu with contact reserved to Mr Forbes on a supervised basis as approved by lawyer for child. That order was varied on 8 March 2012 with any contact to be supervised by an approved supervised contact provider.
- (e) Mr Forbes applied for a parenting order as to contact on 15 May 2012.
- (f) Mr Forbes had 10 supervised visits with Wiremu at [name of contact facility deleted] between 11 July 2012 and 10 December 2012 until [name of contact facility deleted] terminated contact because of Mr Forbes behaviour and attitude (see report of Ingrid Benton dated 1 February 2013).
- (g) there was one further supervised visit at [name of contact facility deleted] on 21 June 2013 which was observed by psychologist, Gerard Dolan for the purposes of completion of a s 133 report dated 28 June 2013. A two day hearing was held in December 2013. His Honour

Judge Ellis presided over that hearing. The issue the Court had to determine was whether or not to reinstate supervised contact at [name of contact facility deleted]. At that time Mr Forbes was residing in Levin and was seeking one supervised visit each month. Ms King was opposed to any contact at all.

- (h) In an oral judgment of 17 December 2013 Judge Ellis directed that supervised contact resume at [name of contact facility deleted] for one hour per month.
- (i) Mr Forbes had 12 visits at [name of contact facility deleted] during 2014 and had four visits during the first four months of 2015. Each of those visits except the last visit in April 2015 was funded by the Court.
- (j) On 20 July 2015, His Honour Judge Courtney made directions for a further hearing as Mr Forbes had confirmed that he wished to have unsupervised contact. Ms King opposed any move to unsupervised contact as did lawyer for child, Mr P Shearer. Directions were made by His Honour Judge Courtney and because the interim parenting order of December 2013 had lapsed a further interim parenting order as to supervised contact was made.
- (k) Mr Forbes advised the Court by email dated 12 August 2015 that the ill-health of his mother had caused difficulty in complying with the Court's directions of 20 July 2015 and sought they be amended. Judge Courtney deferred to that request and extended the time for filing of further affidavits.
- (l) As a consequence of those directions not being complied with Ms King's counsel, Ms S Hurley filed an application to strike out Mr Forbes application and sought costs. Judge Courtney made directions as to dealing with the application to strike out the proceedings.

- (m) An email was received from Mr Forbes dated 14 October 2015. His Honour Judge Courtney treated Mr Forbes' email as a request to discontinue his application dated 15 May 2012 and accordingly brought that matter to a conclusion. His Honour discharged the interim parenting order of 20 July 2015 and made a final parenting order in respect to contact providing that Mr Forbes could see Wiremu monthly at [name of contact facility deleted] for one hour.

[3] Against that background Ms King seeks an order for costs against Mr Forbes.

### **Application by Ms King**

[4] Ms Hurley filed submissions dated 9 November 2015 and a memorandum dated 17 December 2015 in respect to her client's application. In her submissions dated 9 November 2015, Ms Hurley advised that Ms King has not been in receipt of a grant of legal aid for any of the proceedings involving Mr Forbes although she was charged at an agreed reduced rate given her financial circumstances. Ms Hurley advised that her legal costs were as follows:

- (a) domestic violence and parenting proceedings to April 2012 - \$1332.50;
- (b) parenting proceedings and relationship property proceedings to February 2014 - \$4182.50;
- (c) parenting proceedings and relationship property proceedings to 5 June 2015 - \$20,000.26; and
- (d) current attendances on parenting proceedings to 9 November 2015 - \$1304.25.

[5] From the above amounts charged to her client, Ms Hurley was not able to specifically identify what part of her fees charged to Ms King related to the parenting proceedings.

[6] Ms Hurley invited the Court to put to one side the legal costs relating to applying for an interim and then final protection order and accepted that Mr Forbes should not be responsible for any legal costs relating to the relationship property proceedings. Ms Hurley advised that “it is respectfully calculated that the legal fees for just the parenting proceedings total as a minimum \$10,000.” At the invitation of Judge Courtney, Ms Hurley calculated costs in accordance with category 2B of the District Courts Rules 2014. Ms Hurley’s calculation in accordance with the rules was a total amount of \$20,114.

[7] No advice was provided as to Ms King’s financial situation other than she was in receipt of a government benefit. Nor does the Court have any advice as to Mr Forbes’ position. Ms Hurley advised that in mid-2015 relationship property proceedings were settled by way of a payment of the sum of \$165,000 to Mr Forbes. I infer that Ms King paid Mr Forbes that sum so she could retain relationship property assets. Ms Hurley advised in her submissions of 9 November 2015 that Ms King’s sole income being a benefit she was going to have to pay her legal fees off by weekly instalments.

### **Legal principles**

[8] Section 142(1) Care of Children Act 2004 states that the Court may make any order as to costs as it thinks fit. That of course is a broad discretion. Nevertheless the discretion should be exercised on a reasoned and principled basis<sup>1</sup>.

[9] Guidance can be gained from Rule 207 Family Courts Rules 2002, the District Courts Rules 2014 and from case law. Rule 207 provides:

#### **207 Costs at discretion of court**

- (1) The court has discretion to determine the costs of—
  - (a) any proceeding;
  - (b) any step in a proceeding;
  - (c) any matter incidental to a proceeding.

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<sup>1</sup> Wishart v McEwan (1998) 16 FRNZ 528, [1998] NZFLR 473

- (2) In exercising that discretion, the court may apply any or all of the following DCRs, so far as applicable and with all necessary modifications:
- (a) 14.2—principles applying to determination of costs:
  - (b) 14.3—categorisation of proceedings:
  - (c) 14.4—appropriate daily recovery rates:
  - (d) 14.5—determination of reasonable time:
  - (e) 14.6—increased costs and indemnity costs:
  - (f) 14.7—refusal of, or reduction in, costs:
  - (g) 14.8—costs in interlocutory applications:
  - (h) 14.9—costs may be determined by different Judge:
  - (i) 14.10—written offers without prejudice except as to costs:
  - (j) 14.11—effect on costs:
  - (k) 14.12—disbursements.
- (3) This rule is subject to the provisions of the family law Act under which the proceedings are brought.

[10] Proceedings under the Care of Children Act 2004 (“the Act”) differ from other civil proceedings in that there is a specific statutory direction, s 4(1)(a) that in the application of the Act “the welfare and best interests of the child in his or her particular circumstances must be the first and paramount consideration.”

[11] It has been accepted by the Court of Appeal and High Court that the paramountcy principle must be an overarching consideration when the Courts are making cost awards under the Act. In *Hawthorne v Cox*<sup>2</sup> at [26] the Court of Appeal stated:

In our view, the starting point must be s 4(1) of the CCA. This provides that the welfare and best interests of the child must be the first and paramount consideration both in the administration of the CCA, including any proceedings under the Act, and in any other proceedings involving the guardianship of, day-to-day care of or contact with the child. The High Court Rules, as subordinate legislation, have to be interpreted in accordance with that principle.

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<sup>2</sup> [2008] NZCA 146

[12] Heath J in *R v S [Guardianship]*<sup>3</sup> stated at [63] in respect of the impact of cost orders on children:

In my view, it is wrong in principle to make an adverse order for costs against a parent who advances a genuine and responsible argument in what he or she regards as the best interests of the child. If costs orders are made in those circumstances they may operate as a disincentive for such arguments to be put to the Court.

[13] The relevant matters to be considered by the Family Court when it comes to exercising its discretion in relation to costs was summarised in *AHM v EAD*<sup>4</sup> where Her Honour Judge E Smith at [9] said:

- (a) The overriding need to ensure effect is given to the paramountcy principles in section 4 of the Care of Children Act 2004 if applicable;
- (b) The object of the legislation;
- (c) The disputes in question;
- (d) The way the parties and their advisors conducted the proceedings;
- (e) The means of the parties;
- (f) The actual cost incurred by the parties;
- (g) The overall interests of justice;
- (h) A need to be mindful that a genuine and reasonable litigant ought not to fear an award of costs and given the inquisitorial jurisdiction it is important all relevant arguments are heard.

## **Discussion**

[14] It is apparent from Ms Hurley's submissions dated 9 November 2015 and memorandum of 17 December 2015 that Ms King is seeking an award of costs from the commencement of the parenting proceedings in early 2012. The difficulty, of course, that I have in dealing with this application is that His Honour Judge Ellis dealt with the major piece of litigation being the Court hearing on 16 and 17 December 2013 and thereafter His Honour Judge Courtney dealt with the file in terms of further directions and minutes. As best I can discern from the file there were no further Court appearances following the hearing in December 2013.

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<sup>3</sup> [2004] NZFLR 207; (2003) FRNZ 1017

<sup>4</sup> FC Christchurch FAM-2007-009-1579, 16 March 2010

[15] As I have earlier set out, the calculation by Ms Hurley of costs on a category 2B basis in accordance with the District Court Rules 2014 would provide for her client to be awarded costs of over \$20,000. However, Ms Hurley's submissions of 9 November 2015 advise that as best she is able to advise the legal fees for the parenting proceedings is a minimum of \$10,000. A party cannot be awarded costs of any greater sum than they have incurred.

[16] As I understand the decision of Judge Ellis the hearing in December 2013 dealt with whether or not Mr Forbes should have any contact with Wiremu and if so what the terms of that contact should be. Ms King's position was that no contact should take place while Mr Forbes sought monthly contact on a supervised basis. Judge Ellis recorded that he was particularly impressed with the evidence of the psychologist Gerard Dolan. His Honour stated at [5] of his oral judgment:

... He [Mr Dolan] said that there were some risks for Wiremu even I [sic] supervised contact. But it was his view that he repeated to me that he believed on balance the risk for Wiremu in one hour a month of supervised contact was less than the risk for Wiremu if he lost a meaningful relationship with his father.

[17] Accordingly Judge Ellis directed that supervised contact resume at [name of contact facility deleted] for one hour per month. That was the outcome that Mr Forbes was seeking. It would be contrary to the principles I have earlier discussed for there to be any award of costs against Mr Forbes in respect to the proceedings up to December 2013. Judge Ellis appears to have decided that Mr Forbes was advancing a genuine and responsible argument in the best interests of Wiremu.

[18] In hindsight it would have been more appropriate for Ms King to have sought costs following the conclusion of the hearing by Judge Ellis in December 2013. His Honour would have been best placed at that point to make a determination in respect to the matter of costs. As I have set out it appears on the face of the decision of Judge Ellis that against Ms King's opposition Mr Forbes was granted the supervised contact with Wiremu he sought. Thereafter he conscientiously complied with the interim parenting order that Judge Ellis made for quite some time.

[19] Mr Forbes undertook that monthly contact throughout 2014 until April 2015. The contact came to a conclusion at around the time that Court funding ceased. That also coincided with when there was pressure for the proceedings to be brought to a final conclusion.

[20] When the interim parenting order was set for review, being 12 months after it had been made, not unusually there was a time lag before reports from the supervisor, Ms Benton at [name of contact facility deleted] and lawyer for child, Mr Shearer, were available to the Court. Following those reports being available, the Court sought to clarify Mr Forbes' position and he indicated in mid-2015 he wished to continue with his parenting application of May 2012 and seek unsupervised contact. Directions were then made for a hearing to decide that issue despite Ms King and lawyer for Wiremu, Mr Shearer opposing any change in the contact regime.

[21] In the face of the information available to Mr Forbes it was not a wise decision to seek unsupervised contact. However, before any significant work was required on the part of Ms King the application was discontinued.

[22] During mid-2015 Mr Forbes' mother was ill and had to be hospitalised. He was not able to prosecute his application in accordance with the directions made by Judge Courtney and in October 2015 effectively discontinued the application.

[23] Having regard to the principles that I have set out earlier in respect to an award of costs in Care of Children Act proceedings, it seems to me that the only period in which costs could properly be awarded against Mr Forbes concerns his decision to continue with an application for unsupervised contact with Wiremu. The timeframe of that period of the litigation is late May 2015 to 14 October 2015. From what I understand from the file, the directions made by His Honour Judge Courtney as to the filing of further affidavits were not complied with. On Mr Forbes part this was due to the illness of his mother. Accordingly there was no need for Ms King to file any responding affidavits.

[24] During the period late May 2015 to 14 October 2015 Ms Hurley filed memoranda for Judge Courtney to consider in chambers and a memorandum and submissions in respect to the application for costs. There was also an application seeking that Mr Forbes proceedings be struck out for want of prosecution. That application was not determined because the email of 9 October 2015 from Mr Forbes was received by the Court which His Honour Judge Courtney interpreted as a desire on his part to discontinue his application.

[25] Standing back therefore it seems to me that an award of costs in respect to the work carried out by Ms Hurley on behalf of Ms King from May 2015 to November 2015 would be appropriate. In her submissions dated 9 November 2015 Ms Hurley recorded that the “current attendances on the parenting proceedings to 9 November 2015 amounted to \$1304.25.”

[26] I do not see any reason why there should be an award of indemnity costs for that period.

[27] I determine that there be an award of costs of \$750 in favour of Ms King to be paid by Mr Forbes.

G P Barkle  
Family Court Judge