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

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IN THE FAMILY COURT
AT WHANGAREI

FAM-2015-088-000367
[2016] NZFC 6369

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	HUGH IBBOTT VIOLET IBBOTT Applicants
AND	LOUISE WESCOTT QUINN WESCOTT First Respondents
AND	SAM GORE Second Respondent

Hearing:	25 July 2016
Appearances:	M Miles for the Applicants S Henderson for the First Respondents L Alexander for the Second Respondent
Judgment:	3 August 2016

RESERVED JUDGMENT OF JUDGE T H DRUCE
[Section 140 Strike Out Application]

Introduction

[1] The applicant maternal grandparents seek leave to apply for contact parenting orders. The first respondents apply to have the court strike out the maternal grandparents' applications, relying on s 140 Care of Children Act 2004 ("COCA").

Background

[2] Joe is aged 12 and Skyla, 5. The first respondent, Louise Wescott, is the mother of both children. The second respondent, Sam Gore, is the father of Joe while the first respondent, Quinn Wescott, is the father of Skyla.

[3] Joe's parents separated when he was about six months of age. Thereafter, his father had no contact whatsoever with Joe until contact was re-established in April 2015. Since then regular fortnightly contact has occurred for a period of a day or so each alternate weekend.

[4] Joe's parents lived with the maternal grandparents from when Joe was about six weeks of age until Joe reached six months at which point they separated. Thereafter, Joe remained living in his maternal grandparents' home with his mother until he was about 18 months old.

[5] The mother acknowledges that, even though her relationship with Quinn commenced as early as July 2005, they did not really commit to living together until July 2007. Indeed, she accepts her parents' view that they were not living together for the period July 2006-2007. At the time, she was training for and beginning her [career details deleted] and inevitably her parents were very involved in Joe's care, providing "backup" parenting/childcare as they supported her getting established with her professional career.

[6] The parties also agree that there has been some instability in Louise's and Quinn's relationship. They lived apart for three to four months in 2010 reconciling just prior to Skyla's birth. Louise also acknowledges living apart from her husband from November 2012 until April 2013. His availability to parent the children was also limited due to his taking work in [location deleted] from 2011 and having two-

week periods of leave back in New Zealand from time to time. Their reconciliation in April 2013 occurred when the mother and children relocated to [location deleted] where the family remained living until returning together to Whangarei early in April 2015.

[7] Not surprisingly given all these circumstances, the applicant grandparents had a greater role than many other grandparents would have had in supporting the children's mother in the absence of both fathers from time to time and understandably a close relationship was established between Joe in particular and his grandparents. The grandparents have provided considerable, and detailed, evidence, corroborated by others, as to the extent of their involvement particularly in Joe's earlier years.

[8] Nevertheless, it is also clear that the mother has had an ambivalent relationship with her parents throughout the children's lives and, indeed, there are indications that these issues pre-date the children's arrival. It is plain that there are complex and somewhat unstable relationships between her and her parents. On the other hand, it is plain that the applicants have been generous both with time and financial resources in supporting Joe's health needs, development and schooling. It is also plain that the first respondent mother has experienced their involvement from time to time as being over involved, "too emotionally intense" and as being intrusive on her own independence and her own family life with her husband.

[9] For his part, the maternal grandfather describes himself as being like a father to Joe from when Joe's father left and ceased all contact with Joe. The mother also gives evidence that her parents were not accepting of her choice of Quinn as her husband and were at times unacceptably rude both to her and to him.

[10] The above summary grossly simplifies the complex dynamics involved, but at least serves the purpose of describing to some extent the context in which the parties' difficulties have developed. These were not resolved by the first respondent parents relocating with the children to [location deleted]. By February 2014, phone and Skype calls had broken down between the children and the grandparents and the applicants initiated family dispute resolution in [name of city deleted]. After the

mother failed to engage, the applicants filed proceedings in the [name of overseas court deleted] in June 2014. Subsequently, the parties did engage in counselling and some 12 sessions were undertaken by Claire Franks of [location deleted], during the period February through April 2015. In April 2015, the family returned to Whangarei, New Zealand, and has since been living relatively close to the applicant grandparents.

[11] In [location deleted], some agreement to ongoing contact was reached and, indeed, various types of contact have since occurred albeit relatively limited. The [name of overseas court deleted] proceedings were not concluded due to the parents' return to New Zealand. The court authorised the parties to disclose all of the court's pleadings to the New Zealand Family Court.

[12] The present proceedings were commenced in August 2015 and were placed on the standard track. On 19 August 2015, the court exempted the parties from attending further family dispute resolution or being required to attend a Parenting Information Programme. Nevertheless, when the matter came before Judge Neal on 23 November 2015, the parties consented to attending counselling with a Mr Peter Martin, an experienced counsellor in Whangarei. This was done notwithstanding that some four days earlier the first respondents had filed their striking out application. Some three weeks later the applicants' counsel filed a memorandum advising that the parties had been unable to settle arrangements for the commencement of counselling and asked for the matter to be brought back for further directions. As a consequence, a two-hour submissions only hearing was directed to determine the strike out application and the applicant grandparents' application for leave.

The law

[13] Section 140 of the Act provides:

> **140 Power to dismiss proceedings**
>
> The court may dismiss proceedings before it under this Act if it is satisfied—

(a) that the proceedings relate to a specified child, and that the continuation of the proceedings is, in the particular circumstances, clearly contrary to the welfare and best interests of the child; or

(b) that the proceedings are frivolous or vexatious or an abuse of the procedure of the court.

[14] It is a serious step for the court to strike out an application. Any unjustified striking out or dismissal may well amount to a miscarriage of justice: *BAM v AJG* [2011] NZFLR 352 at para [16].

[15] In relation to s 140(a), "clearly" requires a distinct, plain, unambiguous, manifest case, not one that is confused or doubtful: *Chief Executive of MSD v Chandey* [2015] NZFC 1728. In considering the welfare and best interests of a particular child, the court is required to consider all of the provisions in ss 4-6 of the Act.

[16] In relation to s 140(b), Judge Moss in *NZCYPS v B* [1996] NZFLR 385 at [388] said, when considering the identical wording of s 207 of the CYPF Act 1989:

> … Frivolous means paltry or trifling or not serious. While it could never be said that the subject of a custody application is not serious, the substance or presentation of such an application could come into this category. In a legal context the word "vexatious" has come to mean "not having sufficient grounds". The third alternative in this section, is an abuse of the procedure of the court. The court is the forum for resolution of justiciable disputes. If court processes are instituted and are being used for another purpose, that constitutes an abuse of process.

[17] I keep in mind that "abuse of procedure" means that the process of court must be used bona fides and properly, not for ulterior or improper purpose. The categories of what amount to abuse of process are not closed and depend upon the facts of each individual case. Included in the term are attempts to re-litigate matters already determined: see Chisholm J in *M v S* (2000) 19 FRNZ 503.

[18] In relation to the maternal grandparents' application for leave to apply for a parenting order under s 47(1)(d), counsel were agreed that the principles enunciated in *Barker v Cargill* [2007] NZFLR 1108 are the appropriate criteria to be satisfied:

(a) The application is not frivolous, vexatious, or vindictive; and

(b) The applicant is shown to have an appropriate and sustainable interest in promoting the welfare and best interests of the child; and

(c) It is sufficient if the applicant can show there is an arguable issue.

[19] I have found it useful to read Justice Andrew's discussion in that case of the change in the appropriate threshold resulting from the enactment of COCA. She noted the greater emphasis in s 5 to the children's relationships with his or her family, family group, whānau, hapu or iwi and I have had particular regard to her discussion at paras [34]-[45] and [55]-[63].

[20] Finally, while not addressed by counsel, I keep in mind the legal principle applied more broadly in the civil jurisdiction that the strike out jurisdiction requires the court to be satisfied that it has the material evidence before it on which to come to a definite conclusion: see *Telecom NZ Limited v Clear Communications Limited* (1997) 6 NZBLC 102.

[21] I do not propose to set out the parties' respective submissions, rather I will deal with their argument in the course of my findings.

Findings

[22] First, while I am satisfied that the parties have filed full evidence, there is no evidence of either child's views. There has been no appointment of lawyer for the children and there is no other evidence that gives voice to either child's views. The contact proceedings plainly fall within s 6(1) of the Act and s 6(2) requires:

(a) A child must be given reasonable opportunities to express views on matters affecting the child; and

(b) Any views the child express (either directly or through a representative) must be taken into account.

[23] Joe is 12 years of age and has very significant relationships with all of the parties involved. In addition, he has historically had a very close relationship with

his maternal grandparents albeit there is a reasonable likelihood that this has become somewhat clouded by the adult dispute over the last 2-3 years. His views are likely to be given considerable weight by the court in any final determination of these proceedings. While Skyla's views may not be given such weight, nevertheless the court has a statutory obligation to give her a reasonable opportunity to express her views and there is clear evidence that she has a meaningful relationship with her grandparents to the extent that she is described as happily approaching and engaging with them while watching her older brother play sport.

[24] In my judgment, the failure to provide the children with the procedural opportunity of giving their views, and the absence of their views, must prove fatal to the strike out application. This is true in general legal principle (as not all the relevant evidence is available) and this is true due to the court's failure to date to comply with s 6 COCA (how can I be satisfied that the contact application is clearly contrary to the welfare and best interests of each child without having the children's views available to me?).

[25] In fact, a child-focused approach will, in my judgment, be the key to any resolution of the current dispute between the parties, whether that be by way of counselling or other alternative dispute resolution, or by way of court determination. It is the only approach that will avoid capture by the parties' current preoccupations and interests and will enable them and, if necessary, the court to approach the issue informed by what the children desire and need.

[26] I note that the differences between the parties' proposals at the time of the hearing have narrowed considerably. At the most simple level, the difference in the proposed frequencies of contact is between fortnightly contact as proposed by the applicants and monthly contact as proposed by the first respondents. The second respondent while supportive of the first respondents' application for strike out, nevertheless signals that he is content with his current contact with Joe.

[27] Furthermore, I note that there are no safety issues raised in the evidence that will require the court to restrict either child's relationships with their maternal

grandparents other than protecting the children from exposure to the adult conflict and adult views.

[28] I consider it was essential to have appointed a lawyer for both children prior to the hearing of these applications. To strike out the maternal grandparents' applications without each child having been given the opportunity to express their views on the contact issue would likely give rise to a miscarriage of justice to the two children involved.

[29] I consider the same reasoning applies to s 140(b) at the very least to determining whether the applications are frivolous or vexatious. Again, the views of each child may well be a significant factor to assessing whether an application is "trifling" or not. The significance to the particular child in his or her particular circumstances is central to the court's decision-making.

[30] I acknowledge if there had been repeated proceedings resulting in the children being repeatedly interviewed by their representative or lawyer in order to obtain their views, and their views had been consistently expressed, the court may well be reluctant to have the children re-engaged in any further legal process. This possible exception is recognised in s 9B(3) Family Courts Act 2013 where the court has the power to direct that lawyer for the child not interview a child or young person "because of exceptional circumstances".

[31] Notwithstanding the fatal absence of the children's views, it is plain that the contact application is not frivolous or without sufficient grounds. There is a plainly arguable case for the court to support some form of continuing relationship between both children and their maternal grandparents. Are continuation of these proceedings an abuse of court process? Yes, there is adult conflict, most particularly between the mother and her parents which has ebbed and flowed over the years and, yes, the respondents face significant legal fees, but these considerations probably apply to a majority of Family Court proceedings.

[32] Counsel for the first respondents argues this is a clear case where the applicants are "motivated by a desire to control their daughter and by anger at her

refusal to comply with their wishes". I accept that the mother's evidence is that she holds such subjective views, but a wider reading of the evidence also provides other possible explanations for the dynamics operating between the parties. It is entirely proper for the applicant grandparents to challenge her subjective view of their motivation and to place before the court historical and current evidence that points to other ways of understanding the parties' difficulties in responding appropriately to each child's needs and views. There is, at the very least, an arguable case that the first respondents have been reluctant and/or ambivalent and/or avoidant of engaging in dispute resolution processes.

[33] In short, even if I were to put aside the failure to comply with s 6 COCA, I find no clear case of the grandparents' application being an abuse of court procedure. Accordingly, I would find the strike out application must fail.

[34] I turn to consider the maternal grandparents' application for leave. As conceded by counsel, there is a large overlap between the considerations involved in the strike out application and the grounds to be satisfied for leave to be granted. Indeed, Mr Henderson accepted in oral submissions that if the strike out application was unsuccessful, it was difficult to resist the leave application.

[35] My findings in relation to the strike out application clearly support the granting of leave to bring the contact application. The first limb of the threshold test, that the application is not frivolous, vexatious, or vindictive, closely follows the terminology in s 140(b). Vindictiveness would only be one aspect that might fall within "abuse of the procedure of the court".

[36] Secondly, I am well satisfied that the applicants' conduct over the last 12 years does establish that they have an appropriate and sustainable interest in promoting the welfare and best interests of both children whatever complications have arisen in their relationship with their daughter and their son-in-law.

[37] Thirdly, I am well satisfied that the applicants have shown that they have a reasonably arguable issue of contact to be resolved. Subject to the possibility that the children's views may be so adversely affected by the adult dispute around them, I

find it highly probable that some level of modest contact for both children with their maternal grandparents will be the outcome of the proceedings. This is reinforced by the mother's own acceptance that there will be such contact at least on a monthly basis.

Result

[38] The s 140 strike out application is dismissed.

[39] The maternal grandparents are granted leave to apply for a parenting contact order.

Directions

[40] To advance the proceedings, I direct:

(a) Mr Robert Harte is appointed counsel to represent both children. His role is as provided for in s 9B Family Courts Act.

(b) A two-hour Settlement Conference is directed. The additional time beyond the usual 1.25 hours is, I consider, justified given the number of parties involved and the challenges to all parties in reaching a child-focused solution.

T H Druce
Family Court Judge