

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/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS](http://www.justice.govt.nz/family-justice/about-us/about-the-family-court/legislation/restriction-on-publishing-judgments).

**IN THE FAMILY COURT
AT GISBORNE**

**FAM-2012-016-000024
[2016] NZFC 10715**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	ESME TURNBULL Applicant
AND	DWAYNE PAGE Respondent

On the papers

Appearances: S Cummings for the Applicant
L J Rishworth for the Respondent
V L Thorpe as Lawyer for the Children

Date: 16 December 2016

**RULING OF JUDGE M A COURTNEY
[COCA: s 133(10) second opinion application]**

[1] In considering these proceedings the Court has directed and obtained a report under s 133 Care of Children Act 2004 from Annette Barnes, psychologist, dated 10 October 2016.

[2] The applicant seeks the Court's approval pursuant to s 133(10), (11), (12) and (13) "... permitting the obtaining of a critique of ..." Ms Barnes' report. The application is opposed by Mr Page.

The law

[3] Section 133 of the Act was amended with effect from 31 March 2014. Prior to the amendment, application could be made for a critique of a s 133 report. Section 133(10) now provides for a second opinion to be prepared and presented. Before a second opinion may be prepared and presented the approval of the Court must first be obtained. Section 133(11) stipulates that the Court may give approval only if there are "exceptional circumstances". While s 133(1) contains a number of definitions relevant to s 133, no definition is given of "exceptional circumstances".

[4] In *BDD v IBG*¹ Judge von Dadelszen considered "exceptional" in the context of section 64 of the Act. His Honour referred to the *Oxford English Dictionary* definition of exceptional as meaning –

Of the nature or forming an exception: out of the ordinary course, unusual.

[5] In *Schillinger v Jarvis*² the applicant sought approval for a second opinion primarily because the report writer had spent two and a quarter hours with the mother over and above the time she had already spent observing, and without offering the father the same opportunity. Whilst the Court found it unusual the report writer had made special time with the mother and had not explained that in her report, it determined these were not exceptional circumstances. The Court considered them to be unusual, but in the overall context of the case they were not exceptional. The Court was particularly concerned to ensure that a five day hearing of the long running proceedings proceed some two months later. The Court however

¹ *BDD v IBG* [2006] NZFLR 862.

² *Schillinger v Jarvis* [2016] NZFC 5500.

considered it appropriate that the father be given access to the materials the report writer had in relation to her data and other associated records.

Submissions in support of the application

[6] Extensive submissions have been filed on behalf of Ms Turnbull in support of the application. In total they run to some 24 pages. I do not intend to traverse all of the submissions. For example,³ reference is made to the report writer's statements as to the circumstances in which the allegations before the Court arose and an alleged statement by Ms Turnbull that she did not like the previous week about shared care arrangement. It is then said that both of those statements are strongly addressed in affidavit evidence filed by Ms Turnbull. Points such as those and many of the points set out in paragraph 11 and elsewhere in Mr Cummings memorandum are matters which can be addressed in evidence in the hearing. They do not warrant the approval of a second opinion.

[7] A large number of the submissions involve a comparison between statements alleged to have been made to the report writer and statements contained in affidavits filed in the proceedings. Similarly, they can be addressed in the hearing.

[8] There are a number of other submissions which do not fall into that same category which I address.

Ms Barnes' qualifications

[9] It is submitted that the qualifications listed by Ms Barnes in her report "... are the lowest level for someone responsible for the preparation of a report of this importance in this specialised area." It is surmised that Ms Barnes principal areas of expertise are in educational psychology and mental health. It is stated that she has not worked for Children, Youth and Family Services. It is also surmised that Ms Barnes work in the area of sexual and physical abuse has arisen in her private practice only. It is also stated that it is unclear whether or not Ms Barnes has written reports dealing with allegations of child sexual abuse.

³ [9] of memorandum dated 20 October 2016.

[10] Ms Barnes has listed that she qualified in 2003. She spent three years working in special education. She worked for nine years as a psychologist in child and adolescent mental health services. She has been in private practice since 2007. Her areas of practice include assessment and therapy for depression, anxiety and trauma (including sexual and physical abuse) for children, young people and adults. Ms Barnes has been a Family Court specialist report writer and specialist counsellor since 2009.

[11] In the 12 months that I have been working in the Gisborne Family Court I have not had any dealing with Ms Barnes. Consequently I have no personal knowledge of her suitability as a report writer in this case. However, she has been assessed as having the appropriate expertise to be appointed to the list of report writers for the Court. In addition, she has been considered as an appropriate psychologist to be appointed to write the report directed in this case.

[12] There appear to be no exceptional circumstances surrounding Ms Barnes' qualifications warranting the approval of a second opinion.

Did Ms Barnes have all affidavit evidence provided to the Court when she wrote her report?

[13] Ms Barnes has not listed in her report the documentation she received and considered in preparing her report. At a pre-hearing conference on 8 December 2016 I addressed this issue to enquire if Ms Barnes did have all documentation and, if she did not have all documentation available at the time she prepared her report, to provide any necessary update having regard to the additional documentation, which is to be provided to her.

[14] Whilst not raised by Mr Cummings in his memorandum, Ms Thorpe, lawyer for the children, pointed out that Ms Barnes had not been granted access to view the Child, Youth and Family Service file when preparing her report. Ms Thorpe considered it appropriate for Ms Barnes to do this in order to provide her report to the Court. Once again, on 8 December I made directions to address this issue. Any shortcoming in the provision of information to Ms Barnes has been addressed.

Ms Barnes has not acknowledged her obligations pursuant to Schedule 4 of the High Court Rules

[15] There is no such acknowledgment in Ms Barnes report. As noted by counsel for the respondent, Ms Barnes will have the opportunity to do so when giving sworn evidence in Court. This does not amount to an exceptional circumstance warranting a second opinion.

A second opinion will give the applicant confidence in the outcome of the investigations

[16] Ms Turnbull is concerned that there has been inappropriate behaviour by Mr Page with either or both the children. The matters she has raised have been referred to both the police and Child, Youth and Family Services. Neither of those organisations is pursuing the allegations and have closed their files.

[17] Submissions on behalf of Ms Turnbull suggest that she does not believe Ms Barnes has undertaken a thorough investigation of the concerns raised by her. It is submitted it is important for Ms Turnbull to have confidence in the outcome of the investigations and a second opinion would assist in achieving that. It is submitted that “without the report being properly tested it is hard to imagine that the applicant mother will have the confidence to move forward towards a more conclusive parenting arrangement with the father ...”.

[18] I accept the submissions of counsel for Mr Page that it is inappropriate for a second opinion to be approved for the purposes of “testing” a psychological report. The appropriate forum for testing evidence, including specialist reports, is in the Court is by way of cross-examination.

[19] The fact that a party does not like or accept the content of a s 133 report and requires a second opinion to have confidence their concerns are properly investigated is not an exceptional circumstance. The applicant’s concerns will be fully investigated by the Court in the course of the hearing.

The report focuses on the parents not the children

[20] Section 133(1) defines a “psychological report” as a report that is about the child who is the subject of the application and that covers one or more of matters specified in the subsection. Counsel for the applicant submits that, on its face, Ms Barnes’ report appears to focus on the parents.

[21] Whilst it is clear that the definition of psychological report requires it to cover matters focused on the child, the definition in s 133(1) can also require an assessment of the abilities of other persons, most particularly the parents, and the impact of those abilities on the child. These include:

- (d) the effect or likely effect on the child of each party’s parenting skills.
- (e) the effect or likely effect on the child of the parties’ ability or otherwise to co-operate in the parenting of the child.

[22] The approved brief in this case, which was agreed following consultation between counsel, included a request for the report writer to specifically comment on;

- (a) the ability of each parent to meet the physical, emotional and psychological needs of the children; and
- (b) any personal characteristics of either parent which would impair their ability to parent safely,

[23] The submissions for the applicant do not specifically identify any aspect of the report where comment on the parents is said to have gone beyond the brief for the report writer. No exceptional circumstance is made out.

Psychometric assessment tools used by Ms Barnes may not be appropriate

[24] Counsel for Ms Turnbull refers to the psychometric assessment tools detailed by Ms Barnes as used in the preparation of her report. It is submitted that the assessment tools may be out of date or inappropriate for the purpose of the report.

One of the assessment tools relied on is stated as being "... designed for the clinical assessment of adults ages 18 years and older." Reference is also made to the New Zealand Psychological Society's Guidelines to psychologists working in Family Courts with the suggestion the tests used by Ms Barnes may not be appropriate. It is also submitted that one particular test used most commonly in the preparation of reports has not been used by Ms Barnes.

[25] I am not in the position to make any assessment of whether or not the assessment tools used are appropriate. Whilst of course that could be left for cross-examination, that could then result in the situation where doubts about the validity of Ms Barnes' assessment only become apparent in the course of hearing. I believe it is important that any aspects in that regard should be clarified before the hearing so they can either be put to rest, or if confirmed, be addressed by further reporting.

[26] I accept that this identified issue is unusual and does amount to an exceptional circumstance. Accordingly give approval for a second opinion to be obtained by Ms Turnbull.

The extent of the second opinion

[27] An updated Family Court Case Flow Management Practice Note has recently been issued by the Principal Family Court Judge, with effect from 31 October 2016. Appendix 6 to the practice note deals with specialist report writers. Part 10 of Appendix 6 deals with second opinions.

[28] Counsel for the applicant advises that Dr Sarah Calvert is available to provide the second opinion if approval for such opinion is given by the Court. The second opinion is to be provided in terms of the protocol set out in the Specialist Report Writers Practice Note.

[29] Dr Calvert is to provide her opinion as to whether or not the assessment tools relied on by Ms Barnes were appropriate for this case. If Dr Calvert is of the view appropriate assessment tools were not utilised she is to advise what aspects of

Ms Barnes' report, if any, would then be subject to critique by her, and to provide such critique of Ms Barnes' report she takes issue with and her reasons for taking issue.

[30] Mr Cummings is authorised to provide to Dr Calvert a copy of all affidavits filed in the proceedings together with a copy of Ms Barnes' report.

[31] Dr Calvert, as second opinion writer is entitled to inspect Ms Barnes' notes and materials. As Ms Barnes is based in Gisborne and Dr Calvert is based in Auckland, Ms Barnes' notes and materials are to be copied by her and sent to Dr Calvert. I expect there may need to be subsequent telephone contact between Dr Calvert and Ms Barnes to clarify and interpret the notes and materials.

[32] These proceedings have been before the Court for some nine months now, with the children having supervised contact with their father in the meantime. I am advised that Dr Calvert is available to undertake her second opinion once the Court's approval is given. I ask that she prepare and provide her second opinion as soon as practicably possible.

[33] In accordance with Clause 10.6 of Appendix 6 to the Practice Note, a copy of Dr Calvert's opinion is to be provided to Ms Barnes once received by the Court. Ms Barnes is asked to provide her response to Dr Calvert's opinion as soon as possible.

[34] As provided in clause 10.7 of Appendix 6 to the Practice Note, the costs associated with the preparation of the second opinion will be met by Ms Turnbull. Those costs will include reasonable fees payable to Ms Barnes for her time in assisting Dr Calvert with the access to and interpretation of her notes and materials. If, having received Dr Calvert's opinion the Court is of the view there should be a meeting between Ms Barnes and Dr Calvert (which can take place by way of AVL, Skype or telephone if necessary), then Ms Turnbull will need to meet Ms Barnes' costs involved in such meeting.

[35] Any notes, materials and affidavits provided to Dr Calvert are to be destroyed by her upon completion of her involvement in these proceedings.

M A Courtney
Family Court Judge