EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT HASTINGS

FAM-2015-020-162
[2017] NZFC 7307

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[WILL TOWNSEND] Applicant
AND	[COURTNEY DICKINSON] Respondent

Hearing:	In chambers
Appearances:	M J Casey for the Applicant A C Souness for the Respondent
Judgment:	5 October 2017

RESERVED JUDGMENT OF JUDGE A B LENDRUM
[As to an application for costs]

Introduction

[1] This judgment is the outcome of an application for costs, filed by way of submissions, and brought by the respondent [Courtney Dickinson] (the mother) against the applicant [Will Townsend] (the father). It follows further proceedings filed without notice by the father on 20 June 2017 seeking to invoke the enforcement provisions of the Care of Children Act 2004 (the Act) against the mother.

[2] The application alleged that the mother's actions required formal admonishment by a Judge "to ensure the parenting order will be complied with" and for the payment of the sum of $5000 into Court to cover the father's anticipated future legal costs.

[3] The applications relate to a dispute between the parents over the father's contact with one of the [children] of their former, and dissolved, marriage [Alexander Townsend] born [date deleted] 2003 and now almost 14 years old.

[4] It is important to record that the application followed significantly extensive proceedings before me in this Court from late 2015 until 11 October 2016. The proceedings concluded on that date following a judicial settlement conference convened by me and in which final parenting orders were made by consent.

[5] The orders made at the conclusion of the settlement conference were detailed. They foreshadowed contact between [Alexander] and his [sibling] and their father and all possible contingencies and events surrounding such contact with the father in New Zealand. They were as follows:

> On application made to it by consent, the court orders that-
>
> [details of orders deleted]

[6] I note that in the final order prepared by the Court b(iii) was omitted. This was a numbering mistake only and no term of the order was omitted.

[7] Importantly as set out above order (e) stated as follows:

> "that in the event that the children are so unwell they can't travel **or do not wish to travel** the mother shall provide the father with a medical certificate and confirmation as to when contact can commence" (my emphasis).

[8] The nexus of the father's application was that the mother had not required, or forced, [Alexander] to exercise contact with him.

[9] On 21 June 2017 the without notice application was referred to me as a consequence of my earlier oversight of the matter until 11 October 2016.

[10] In a minute of 21 June 2017 I declined the application on the basis that while jurisdiction had been made out for the application the necessary threshold required to obtain an order without notice had not been met. I then stated:

> "while the (fathers) concern can be well understood it is important in this difficult case that the (mother) is able to put her position before the Court. In the supporting documentation the correspondence between the parties clearly reveals that there are two sides to this matter. In the centre, however, is a young man of over [age deleted] years who apparently will not agree to see his father. There is a recent history (2015-2016) of difficulty in their relationship.
>
> In the consent orders, reached at the end of a one day JSC on 31 October 2016, clause (e) expressly notes that "…if children do not wish to travel the mother shall provide the father…with confirmation as to when contact can commence"
>
> From the correspondence the father has attached it is clear that the mother has advised that the young man is adamant that he will not see his father. In those circumstances she would appear to have performed her obligation under the order because she has advised what she can advise. Clearly given the child's refusal to see his father over the first term holiday, and now the second holiday, she cannot advise when contact will commence.

[11] At the conclusion of my minute I reappointed Ms McLeod as lawyer for [Alexander]. I did so because I was very aware from the evidence on the file, and further as a consequence of my two meetings with [Alexander] during 2016, that he had a great faith in Ms McLeod's representation of his needs, interests and welfare in Court proceedings.

[12] Further I made the appointment because I knew that if there was one independent person [Alexander] could, and would, speak to it would be Ms McLeod. I knew also that he would speak to me, as I was informed of such through the Registry.

However it was clearly unnecessary for me to speak with him when there was a probability that with Ms McLeod's assistance and expertise the issue might not require resolution by the Court.

[13] Ms McLeod saw [Alexander] shortly after her reappointment. As a consequence she was able to recommend a pathway to resolution of this dispute. The process she put forward, lead, and saw to conclusion was a three step process whereby:

(a) Father wrote to [Alexander] setting out his position with that letter being first provided to lawyer for the child to approve or veto as she thought fit before it was received by [Alexander];

(b) Lawyer for child then read the letter to [Alexander] and provided him with a copy of the letter; and

(c) Lawyer for child subsequently confirmed to the father that the agreed process had been completed. Accordingly he withdrew his application.

[14] That notice of discontinuance was filed on 7 July 2017. On 10 July 2017 Judge Courtney made the necessary order confirming the discontinuance. He noted that any issues as to costs would be dealt with by counsel filing memoranda.

The Law

[15] The jurisdiction that provides the Court with the power to admonish any party arises in that part of the Care of the Children Act 2004 (the Act) headed "making parenting orders work". As this case makes clear where there are complex dynamics, and high conflict, these simple words of the statute can be very difficult to achieve in practice.

[16] Section 64 contains principles by which a Court is to be guided in deciding on matters of enforcement. In respect of the power to admonish the only guiding principle is that in determining whether or not to admonish a party the Court must consider whether such a step would serve the welfare and best interests of the subject child or

children. In this case that is [Alexander]. In turn that consideration of welfare and best interests must also be assessed by reference to the s 5 principles set out in the Act.

[17] As to the specific power to admonish s 68 sets out the provisions which direct this remedy. It is a discretionary power. First the Court must be satisfied the party has contravened the subject parenting order. Contravention connotes concepts such as not abiding an order in some way, or not following an order. That is a factual issue.

[18] Clearly no discretion to admonish arises if the factual determination is that no contravention has occurred. Only if the Court has determined on a factual basis that a party has contravened an order must it then turn to the matters of the welfare and best interests of the child in that child's particular circumstances. Those circumstances cannot be ignored in exercising that discretion.

[19] Authority for those propositions is contained in the case of *LH v FD* [admonishments][1] which also confirms that admonishment lies at the lowest level of any hierarchy of possible Court interventions.

[20] In this case admonishment only was sought but with the additional financial sanction of both a bond of $5000, in order to dissuade the mother from any other purported obstructions of the parenting order, together with an order to pay the fathers costs.

[21] The starting point for determination of matters of costs must always be the statute under which the application was made, in this case s 142 of the Care of the Children Act 2004 ("the Act") which provides the Court with a wide discretion. Like most of the Family Law statutes the Act provides no statutory factors to guide the exercise of that discretion.

[22] Rule 207 of the Family Courts Rules 2002 ("FCR") introduced to the Family Court jurisdiction the costs provisions in the District Courts Rules 2014 ("DCR"), contained in DCR 14.2 through 14.12. Applications for costs are decided according to the Court's overriding discretion in s 142, exercised by reference to a range of

[1] *LH v FD* [admonishments] 2010 NZFLR 926

principles in the Rules and to Schedules 4 and 5. The schedules are designed to assist in calculation of time allocations and rates.

[23] From the substantial available case law, such as the cases of *Aalders v Stevens*[2], *A v A*[3] *and R v S*[4], and from the District Courts Rules, the Court is guided by reference to such factors as:

(a) The outcome of the proceedings. As a general principle a party who fails with respect to their position should pay costs to the successful party.

(b) The complexity or otherwise of the matters in issue.

(c) The way in which the parties and their legal advisors conducted the proceedings.

(d) Whether proceedings were made unnecessarily complex or protracted because of stalling tactics or procedural ploys adopted by a party.

(e) The means of the parties.

(f) The actual costs incurred by the parties.

(g) The overall interests of justice.

(h) Where issues arise in respect of children, the Court should also have regard to the impact any order as to costs will, or might, have on the children's welfare[5].

[24] The Court must bear in mind that it is wrong in principle to make an adverse order against a parent who advances a genuine and reasonable argument in what he or

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[2] *Aalders v Stevens* (1992) 5 FRNZ 198
[3] *A v A* [1999] NZFLR 447
[4] *R v S* [2004] NZFLR 207
[5] Ibid, at [60]

she regards as the best interests of the child[6]. The Court should have regard to the objects of the Act under which the costs issue is being determined.

[25] In *AS v JM [Costs]*[7] after referring to the principles applying to costs as derived from *R v S,* the Court stated at paragraph [17];

> [17] While there may be some difference in philosophy as to whether a more civilly oriented approach is taken to costs matters in the Family jurisdiction, there remains a constant thread through the decisions when the Court is considering a party who has been unreasonable. All the decisions make it clear that where a party has acted unreasonably, prolonged the proceedings or has been the recipient of adverse credibility findings then they cannot expect to escape close attention when the Court exercises its discretion on costs issues."

That view was endorsed by Heath J in *S v I*[8] (HC).

[26] In this case counsel for the mother has sought for a payment by the father to the mother equating to her full costs incurred in defending the application. In terms of the law pertaining to indemnity or increased costs the legislative criteria is now contained in District Court Rule 14.6. While the various criteria for indemnity or increased costs are expressly stated in that rule there is also guidance from case law.

[27] The most significant decision in terms of precedent is that of the Supreme Court in *Prebble v Awatere Huata (No 2)*[9] in which the Supreme Court observed that indemnity costs have not been awarded in New Zealand except in rare cases, generally entailing breach of confidence or flagrant misconduct.

[28] In a subsequent Court of Appeal decision *Saunders v Central Grain & Produce (Southland) Limited & Others*[10], the Court of Appeal commented upon the degree of misconduct that would be required to merit a full award. At paragraph [28] it referred to *Prebble* and stated:

> "…in general, orders for costs are to be a reasonable contribution to actual costs and that a reasonable contribution to costs is just in most cases. However, the general approach yields where it does not deliver a just result

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[6] Ibid, at [63]
[7] *AS v JM [Costs]* [2004] NZFLR 57
[8] *S v I (2009)* 28 FRNZ 13 at [54]
[9] *Prebble v Awatere Huata (No 2)* [2005] 2 NZLR 467. At [6]
[10] *Saunders v Central Grain & Produce (Southland) Limited & Others* [2009] NZCA 148

> and in such cases the Court will exercise its discretion to make an order that is just."

[29] "Flagrant" is defined in the Collins English Dictionary as "(i) blatant; glaring; outrageous". Given the views expressed in these decisions and the ordinary meaning of "flagrant", in order for indemnity costs to be awarded there must be behaviours by the errant party that are of a rare, outrageous and extreme level. Such a view is confirmed by reference to cases where the issue of indemnity quality has arisen: see *Hedley v Co-Operative Dairies Limited*[11], where the High Court stated, at paragraph [8]:

> "…Indemnity costs are awarded where truly exceptional circumstances exist."

Analysis

[30] In order to succeed in this case the father must show that the mother had in some way contravened the final parenting order of 11 October 2016.

[31] As I have set out[12] it is clear from both the father's affidavit in support of his application, and the mother's notice of response, that she performed all the obligations placed upon her by the parenting order. Those obligations were to ascertain whether the children wished to visit their father and, if so, to facilitate that travel in accordance with the terms of the order. The documents record that is exactly what she has done in respect of [the younger child] .

[32] The order at (e) expressly noted that if the children do not wish to travel the mother shall provide the father with confirmation as to when contact can commence. In this case [Alexander] clearly determined that he would not have contact with his father and the mother clearly advised the father of that fact. The email communication is explicit on this point.

[33] From my perusal of both parties affidavits filed in respect of this application it appears clear that [Alexander] reached the conclusion that he would not have contact with his father because of the following events or any one of them. They are:

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[11] *Hedley v Co-Operative Dairies Limited* (2002) 16 PRNZ 694
[12] Ibid, at [9]

(a) That at the conclusion of the judicial settlement conference on 11 October 2016 both children were advised of the terms of the agreement by Ms McLeod in the presence of their parents.

(b) That in December 2016 both children saw Ms McLeod again as they both wished to clarify what the position was with respect to the length of time they would be having contact with their father.

(c) The children flew to see their father in [location 1] on [date deleted] December 2016. Issues arose with respect to the extent of the holiday. It appears that the father had planned two weeks with the children in [location 1] and then a week at [another location]. This was contrary to the children's expectations.

(d) On [day deleted] 2016 before he was scheduled to fly back to [location 2] [Alexander] telephoned his mother. During the course of that conversation he explained that he was being pressured by his father to remain in [location 1] and not return home. [Alexander] then told his mother that he would return home as originally planned.

(e) The next day matters became more difficult and it appears both children became upset at the pressure being placed upon them to extend the holiday beyond that which they had originally determined they would enjoy with their father.

(f) That when the children returned it became very clear that [Alexander] and his father had had a further falling out over what [Alexander] determined was the pressure being placed on him to stay with his father for three weeks.

(g) The mother's evidence is that [Alexander] was so upset by the events that he had to repeat himself so that she could understand what he was saying. That is an important point because in both my meetings with [Alexander] I found him to be very clear and lucid in what he wanted

to say and in the way he said it. [Alexander] has significant intelligence and a maturity well beyond his years.

(h) There were further difficulties in respect of a short stay at [the alternative location].

(i) On [date deleted] 2017 [Alexander] received a telephone call from his father. [Alexander] was to attend a [school event – details deleted] . It transpired that the father had advised [Alexander] he wished to attend the [event].

(j) The father was advised in email correspondence, exhibited to the mother's notice of response, which made it clear that [Alexander] did not wish the father to be present.

(k) The father attended the [event] and [Alexander] was most upset that he did so. The school was aware of the situation and the Principal asked the father to leave. The father telephoned his solicitor or counsel who then spoke to the Principal and informed him that the father had the right to attend and would be staying at the [event].

(l) [Alexander] was so upset at this action that he texted Ms McLeod his lawyer about the event.

(m) As a consequence of these actions [Alexander] refused to speak to his father on Sunday evenings on telephone or at any other time that his father tried to contact him. Furthermore he advised his mother towards the end of the first term that he would not be visiting his father during the impending term holiday. He did not visit.

[34] It is important to note [Alexander] is now almost 14 years old. As I have informed both parents and all counsel previously he is, transparently, an academically and emotionally mature young man. He has also physically outgrown his mother and

she could no more force him to travel if he did not wish to than as she said she would contemplate such an action.

[35] The current application was filed prior to the second term holiday. It may well have been filed as a last ditch attempt to get the mother to induce [Alexander] to have contact with his father or it may have been filed as an attempt to lay a paper trail of blame on the mother. In any event it was a return to the high conflict and dysfunction existing prior to the settlement conference in October 2016. Moreover significant pressure was placed on the mother who was informed, both by the father and his then counsel, that [Alexander] did not have a choice regarding his contact.[13]

[36] In my view however whatever the reason for the application it was manifestly doomed to failure because of the clear wording of (e) of the final parenting order.

[37] Moreover as all counsel are aware that clause was inserted in the final parenting order because of [Alexander] very clear views about previously feeling "forced" to extend contact or indeed to go for contact when he did not wish to.

[38] As the father's application had in my view no possibility of success, and the father subsequently discontinued his application, the corollary must be that the father has been unsuccessful in pursuing his application. As such he has left himself open to the mother's claim for costs.

Result

[39] The mother seeks an order for the payment to her of $2576 being the full fee incurred by her in defending the application brought by the father. She seeks these full solicitor client costs against the father on the basis that his application;

(a) Did not disclose material facts regarding to his own behaviour and how that impacted negatively on [Alexander's] desire to have contact with him; and

[13] Letter of counsel to mother 21 April 2017 para (5) and exhibit J to mother's notice of response of 23 June 2017

(b) Did not contain any evidence that could justify a finding that the mother should be admonished; and

(c) Contained no proposals for how the mother could ensure that her 13.5 year old son would attend contact against his will;

all leading to the inevitable result that the proceedings would be dismissed or discontinued.

[40] However I find that these actions by the father do not meet the level set out in DCR 14.6 on the precedent set by *Prebble v Awatere Huata (No 2)*[14].

[41] Accordingly I have considered the District Court's civil schedules with respect to the mother's claims. I see this as a category 2B proceeding because of the very high level of dysfunction, mistrust and conflict in this case. As a consequence each party needed to retain experienced counsel. Further I consider that one day was required to properly present the mother's notice of response and the subsequent memorandum as to costs. That amounts to the sum of $1550 plus any appropriate disbursement costs.

[42] I have given real consideration to the submissions advanced by Mr Casey on behalf of the father and in particular that he had resiled from the conflict after taking the advice of the experienced lawyer for child and, accordingly, discontinued his application.

[43] However at the end of the day that did not occur before the mother, who I note has the day to day care of the child and his sister, had to defend the application which was, on the face of the consent orders of October 2016 at [e], clearly bound to fail.

[44] Furthermore I do not see that the award of costs I make in this case will adversely effect [Alexander] and therefore it will not engage any issues under s 4 and s 5 of the Care of Children Act.

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[14] *Prebble v Awatere Huata (No 2)* [2005] 2 NZLR 467, at [6]

[45] Accordingly on all the evidence in this case and on the balance of probabilities I consider an award of costs is justified. That decision is based upon the evidence and the legal principles applicable in a case such as this where a party has incurred costs defending proceedings which on the basis of the Consent Order of 11 October 2016 had no reasonable prospect of success particularly when the age, and previously expressed views, of this child are noted.

[46] Finally from my knowledge of the file and the evidence I have read I am aware that the award I make will not adversely affect the father in respect of his financial position.

[47] Accordingly I make an award of costs in favour of the mother and against the father in the sum of $1550.

Judge A B Lendrum
Family Court Judge