

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

**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/FAMILY-JUSTICE/ABOUT-US/](http://www.justice.govt.nz/family-justice/about-us/)
ABOUT-THE-FAMILY-COURT/LEGISLATION/
RESTRICTION-ON-PUBLISHING-JUDGMENTS**

**IN THE FAMILY COURT
AT WHANGAREI**

**FAM-2008-027-000011
[2017] NZFC 8126**

IN THE MATTER OF THE CARE OF CHILDREN ACT 2004

BETWEEN [LUCY ALLEN]
 Applicant

AND [BRUCE WADE]
 Respondent

Hearing: 28 September 2017

Appearances: P Cobcroft for the Applicant
 M Littlefair for the Respondent
 U Patel as Lawyer for Child

Judgment: 9 October 2017

**RESERVED JUDGMENT OF JUDGE D F CLARKSON
ON APPLICATION FOR APPEAL AND STAY OF ORDERS**

Introduction

[1] The applicant, Ms [Allen], has sought leave to appeal the interim orders made on 29 June 2017, which reversed the primary care arrangements for the parties' child, [Sam]. She further seeks leave to apply out of time, and for a stay of the orders made.

[2] This matter was subject to a review of the interim orders on 28 September 2017. However at that time the present applications were unable to be reached and counsel sought that they be considered on the papers. A further memorandum from the applicant's counsel has now been received. I have also considered the memorandum of lawyer for the child who is the subject of these proceedings. I am also aware, although I do not have written submissions, that the leave and stay application are opposed by the father who has subsequently engaged counsel to represent him.

[3] I have decided to grant leave to appeal but to deny the stay of the orders made which have now been significantly changed to provide for unsupervised contact to the applicant, following the review on 28 September, which recorded significant progress for the child in his relationship with his father.

[4] A hearing for the making of final orders, following the receipt of a s.133 psychological report which has been sought, is allocated for 4 and 5 December.

[5] The reasons for my decision are briefly stated as follows:

The Law

[6] The relevant provisions relating to appeals against orders made under the Care of Children Act 2004 ("the Act") is s.143.

143 Appeals to High Court

- (1) This subsection applies to a decision of the Family Court or District Court, in proceedings under this Act (other than criminal proceedings), to—
 - (a) make or refuse to make an order (other than an interlocutory or interim order); or

- (b) dismiss the proceedings; or
 - (c) otherwise finally determine the proceedings.
- (2) A party to proceedings in which there is made a decision to which subsection (1) applies, or a child to whom those proceedings relate, may appeal to the High Court against the decision. However, if the proceedings are under [section 46C](#) or [46R](#), the party or child may appeal only with the leave of the High Court.
- (3) A party to proceedings under this Act in the Family Court or District Court in which an interlocutory or interim order is made, or a child to whom those proceedings relate, may, with the leave of the Family Court or District Court (as the case requires), appeal to the High Court against the order.
- (3A) However, no appeal may be made to the High Court under subsection (3) in relation to—
 - (a) any interlocutory or interim order made in the following kinds of proceedings:
 - (i) criminal proceedings; or
 - (ii) proceedings under [section 46C](#); or
 - (iii) proceedings under [section 46R](#); or
 - (b) a decision under—
 - (i) [section 7](#) to appoint, or to direct the Registrar of the court to appoint, a lawyer to represent a child; or
 - (ii) [section 130](#) to appoint, or to direct the Registrar of the court to appoint, a lawyer to assist the court; or
 - (iii) [section 133](#) to obtain a written cultural report, medical report, psychiatric report, or psychological report; or
 - (c) a direction under [section 7A\(6\)](#) that the parties may, or may not, be represented at a settlement conference.
- (4) The [High Court Rules 2016](#) and [sections 125 to 130](#) of the District Court Act 2016, with all necessary modifications, apply to an appeal under this section as if it were an appeal under [section 124](#) of that Act.
- (5) On the *ex parte* application of the appellant, the Family Court or District Court (as the case may be) may order that the appellant must not be required under [section 126\(1\)](#) of the District Court Act 2016 to give the Registrar of the High Court security for costs.
- (6) Subsection (5) overrides subsection (4).

[7] The timeframe for filing an appeal against any order is fixed, pursuant to the High Court Rules (as apply pursuant to s.72 of the District Courts Act) as 20 working days following the date of the decision.

[8] Because of the nature of the order, that is a custody reversal in a case where findings of alienation had been found in respect of the child, the orders were announced at the conclusion of the hearing and indeed immediately put into effect by arranging for the child to be handed over to his father, after a brief explanation from the Judge.

[9] As it was late in the day and the case a complicated one, having lasted four days, it was necessary to reserve reasons to be delivered in writing subsequently. These reasons were delivered on 12 July, that is two weeks later.

[10] I accept that in the circumstance it is proper and just to extend the time for Ms [Allen] to file her appeal given that she was entitled to await a reasoned decision before instructing counsel to appeal.

[11] The application for leave was filed on 8 August and had the 20 working days been calculated from the date of release of the reasons the time would not have expired until 9 August. Thus the delay is minimal and understandable. Counsel has referred me to the relevant authorities which have considered the issue of extensions. Having considered those, I am satisfied that the extent of the delay, the circumstances of engaging counsel, the need to await reasons and the lack of prejudice to the respondent are all matters why I ought to grant leave to apply out of time.

Leave to Appeal

[12] The factors to be considered in an application of this sought have been summarised by Her Honour Ellis J in *Malone v Auckland Family Court*¹ as follows:

- (a) The welfare of the child (which is always the first and paramount consideration pursuant to s.4(1) of the Act).

¹ *Malone v Auckland Family Court* [2014] NZHC 1290, at [29]

- (b) The interests of justice including the interests in the finality of litigation.
- (c) Whether the interlocutory order is procedural in nature and what effect it is likely to have on the ultimate outcome of the case.
- (d) The nature and importance of the proceedings generally.
- (e) The importance of the proceeding to the child and any prejudice likely to be suffered by the child as a result of either granting or refusing leave.
- (f) The effect on the child and on any other party of any delay resulting from the granting of leave to appeal and the hearing of subsequent appeal.

[13] Ms Cobcroft submits that while the orders are framed as interim ones “the substantive hearing is finished and the Court has made findings on the evidence”. This is disputed by Ms Patel in her submissions in which she refers to portions of the decisions which refer to the mother not having contact for a period “*until the child had settled*”,² and a reference to Mr [Bruce] being the parent best able to encourage the presence and input of the other parent in the child’s life “*at this point*”.³

[14] The order of 28 June was certainly not intended by the Court to be a final order for the reason that the mother, who had been a significant and more laterally the primary parent for this child, was at that stage, for the reasons stated, granted no contact with [Sam]. That was clearly only a short-term measure and referred to in the decision as a “quarantine”. Indeed within two months supervised contact was directed and at the review hearing in September significant (nine hours each Saturday on an unsupervised basis) contact was ordered in favour of the applicant mother.

[15] Given that the Court regards a parenting- contact order as a key component of a parenting- primary care order and indeed the legislation mandates that the former is

² Paragraph [182] of decision 12 July

³ Paragraph [187] of the decision of 12 July

considered before any latter order is made⁴. It is clear why the order was intended to be interim.

[16] However, that is not the end of the matter. The Court did make findings of fact at the June hearing, that the cause of the children's rejection of their father lay to a large extent, quite squarely at the feet of the mother. Although not included in the written submissions, during the hearing of 28 September counsel for the mother conceded that the mother had professional as well as personal reasons for pursuing the appeal. That is not surprising. The mother is [occupation deleted] by profession and has over recent years [details of employment deleted]. The findings made against her are damning. She is entitled to challenge them at the earliest date.

[17] While it could be argued that in doing so she may be putting her professional interests against her obligations to reduce the conflict in this child's life, that is a matter for her and is not a matter which should prevent an appeal being considered.

[18] Ms Patel argues that it is against the welfare and best interests of the child for leave to be granted – she submits: “delay, disruption of therapy, and continuing conflict between his parents will impact on [Sam]'s welfare and best interests”⁵.

[19] Indeed, there has already been evidence at the September hearing that [Sam] was unsettled around the time the appeal was filed. He will undoubtedly have come to know of this through his [sibling] who resides with his mother and attends the same secondary school. It can only be hoped that in future his parents will find a way to protect him from this level of knowledge.

[20] Having regard to the other factors to be taken account of, namely the interests of justice, the importance to the parents and the child of these proceedings, I consider that leave to appeal ought to be granted.

[21] However the application for a stay of the orders is another matter.

⁴ S52 Care of Children Act 2004

⁵ The delays in the matter reaching hearing a number of times, and their adverse effects of the children were the subject of comment in the 12 July decision

Stay

[22] In supplementary submissions, Ms Cobcroft stated that in seeking a stay the mother would be prepared to alter her position to a resumption of the shared care arrangements that existed before November 2015, when the mother's without notice application suspended father's care of the child (for 20 months until the hearing).

[23] Once again the overriding consideration is the welfare of this child.

[24] There is no doubt that the transfer of custody to his father, who [Sam] had not seen and was purported to fear, in June of this year will have been a shock to the boy. He has subsequently engaged positively in therapy with a local therapist, [name deleted], and that therapy has at times involved his father, who also sees [the therapist] separately. Ms [Allen] has also been involved to a more limited extent in the therapy, although no criticism is intended of her in that regard.

[25] [The therapist] described [Sam] as initially "exhibiting hostility and anger towards his father and ([Sam]) could not see how their relationship could be improved although he desired to that". [The therapist] reported that over the few months since he has been working with [Sam] there has "been a marked changed in his attitude towards his father. He speaks of enjoying his time with his father and been more understanding of him."

[26] [Sam] is also reported as being settled at school and the school refers to him as being "off their radar". That is an improvement on the reports, which were presented at the hearing, and which consistently described [Sam] as disruptive in class and needing to be excluded on occasions. Mr [Wade] is attempting to work closely with the school to monitor [Sam]'s behaviour.

[27] For the reasons set out in the decision of 12 July a change of custody was considered the only option if this child was to have a positive relationship with two parents. It was the "circuit breaker referred to in *Finn v Poole*.⁶

⁶ *Finn v Poole* 2015 HC 1362, Moore J

[28] I am not prepared to have all of the progress that [Sam] has made in his relationship with his father put at risk by a return, at this point, to the previous shared care arrangement, particularly when the care arrangements and [Sam]'s response to them are the subject of a current assessment by a psychologist who has not yet reported to the Court.

[29] It would be cruel to have put [Sam] through this disruption only to have these gains reversed.

[30] His relationship with his mother has not suffered. He has responded well to supervised contact and now has substantial contact with her on a weekly basis. Their relationship would not appear to be at risk. His welfare and best interests demand that his improved relationship with his father also ought not to be at risk.

[31] I do not consider that the refusal of the stay will render any appeal nugatory, particularly since undoubtedly any decision on appeal will have the same intention, that is to foster the child's positive relationship with both of his parents. For those reasons the stay is refused.

Signed at Auckland this 9th day of October 2017 at _____ am / pm

D F Clarkson
Family Court Judge