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IN THE FAMILY COURT
AT NAPIER

FAM-2015-041-000221
FAM-2015-041-000220
[2017] NZFC 7041

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
AND	DOMESTIC VIOLENCE ACT 1995
BETWEEN	[ALIESHA NEWTON] Applicant
AND	[THOMAS WHITEHOUSE] Respondent

Appearances: M J Casey for the Applicant
A J Davies for the Respondent

Date of Decision: 29 September 2017

DECISION OF JUDGE P J CALLINICOS
[Costs and Contribution]

Solicitors:
Carlile Dowling of Napier for the Applicant
Willis Legal of Napier for the Respondent

Introduction

[1] This decision determines issues as to costs inter partes and recovery of costs incurred by the Court in proceedings commenced by the applicant under the Domestic Violence Act 1995 and the Care of Children Act 2004. The decision is made on the papers after consideration of written submissions received from counsel for the parties.

[2] There is an extensive history to these proceedings relevant to these issues. There have been pivotal stages to this protracted proceeding, which are material to the assessment of whether either or both of the parties should contribute to the costs incurred by the other or by the Court. These will be detailed in the discussion which follows.

The Law

[3] The starting point for determination of matters of costs must always be the statute under which the application was made, in this case the Domestic Violence Act 1995 and Care of Children Act 2004.

[4] Unlike other family law statutes, the Domestic Violence Act does not contain any provision as to costs, meaning reference must be had to the Family Courts Rules 2002 ("FCR").

[5] In *L v W* after noting that neither the Domestic Violence Act nor the Domestic Violence Rules 1996 specifically confers a jurisdiction on the Family Court to make an order for costs, Heath J[1] held that the Family Court, as a division of the District Court derived jurisdiction to make a costs award from what was then r 45(1) of the District Courts Rules 1992. This rule is now found in r 14.1 of the District Courts Rules 2014 ("DCR").

[6] Section 142 of the Care of Children Act 2004 ("the Act"), which provides the Court with a wide discretion. Like most of the Family Law statutes, the Act provides

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[1] *L v W* [2003] NZFLR 961, at [13] to [22]

no statutory factors to guide the exercise of that discretion. Accordingly, some reference must be had to the Family Courts Rules.

[7] Rule 207 introduced to the Family Court jurisdiction the costs provisions contained in DCR 14.2 through 14.12. Accordingly, given the absence of any express statutory provision, applications for costs in Domestic Violence proceedings are decided by reference to a range of principles in the District Courts Rules and with the assistance of time allocations and rates found in Schedules 4 and 5. However, the rules must be applied in a manner consistent with the objects and purposes of the statute under which proceedings were conducted.

[8] Although r 207 introduces to family law matters the civil approach to costs as found in DCR 14, the recent High Court decision of *P v S* held[2] that in proceedings under the Domestic Violence Act the general rule that costs should follow the event should not apply to unsuccessful applications for protection orders. Instead the Judge should exercise the discretion by considering all surrounding circumstances in light of the purpose of the Act, an approach which is also consistent with the Care of Children Act. This does not limit the Family Court's ability to award costs against an applicant who has 'acted unreasonably, vexatiously or improperly"[3].

[9] In *IA v RRN*[4] the High Court considered issues of costs in the context of an appeal situation in which the appellant argued that the normal principles under the High Court Rules should apply, namely that costs should follow the event. The respondent opposed, arguing that COCA gives the Court discretion not to award costs if the best interests of the child require it. After observing that differing views had been taken by the High Court as to whether a 'costs follow the event' approach applied in COCA proceedings, Muir J held that a child-centred approach dominates. His Honour noted[5] that although this issue had not been finally resolved at Court of Appeal level, he considered that the weight of authority favours taking a child-centred approach to costs awards in COCA decisions on appeal and that there is no presumption that costs follow the event. He then imported that pattern of authority to

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2 *P v S* [2017] NZHC 1990, at [28]
3 At [29]
4 *IA v RRN* [2017] NZHC 1997, at [11]
5 At [17]

the approach to costs to be taken in the High Court. That being the case, and noting that the Court was considering the approach to costs in the context of an appeal, it would seem incongruous for this Court, as an originating Court to take a different view when determining costs in the substantive proceeding.

[10] In terms of the general approach to exercise of the discretion, from the substantial available case law (such as the cases of *Aalders v Stevens*[6], *A v A*[7] and *R v S*[8]) 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 party.

(e) The means of the parties.

(f) The actual costs incurred by the parties.

(g) The overall interests of justice.

[11] As prefaced, the most appropriate approach is to the determination of costs issues is by reference to the objects and purposes of the legislation under consideration in the particular case[9]. In the case of the Domestic Violence Act the objects are as set out in s 5. In *Surrey v Surrey* the Court of Appeal held[10] that while it is not Parliament's

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6 *Aalders v Stevens* (1992) 5 FRNZ 198
7 *A v A* [1999] NZFLR 447
8 *R v S* [2004] NZFLR 207
9 *L v W*, above n 1, at [29]
10 *Surrey v Surrey* [2010] NZFLR 1, at [119]

intention that protection orders should be used to protect people from unrealistic fears, it is the intention that such orders can be used to protect people from reasonable fears.

[12] In respect of the Care of Children Act it is the welfare and best interests of a child, in his or her particular circumstances that must be the first and paramount consideration in the application of the Act in proceedings involving guardianship of, day to day care of, or contact with a child.

[13] Given the paramount principle in s 4 COCA, 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 she regards as the best interests of the child[11]. The Court should have regard to the objects of the Act under which the costs issue is being determined.

[14] The objects or purpose of the Care of Children Act and the principles for achievement thereof include[12];

(a) to promote children's welfare and best interests,

(b) respect children's views,

(c) encourage agreed arrangements and provide for resolution of disputes.

[15] I have not referred to the legal principles applying to increased or indemnity costs for the reason that it does not appear that the father, as applicant for costs, is seeking such an award. No reference to the principles applying to such awards has been made in the respondent's submissions. It is rather unclear precisely what form of award he does seek as, although reference is made to the actual costs incurred by him, no information has been provided as to what costs according to 'scale' would be, and no statement is made in his submissions as to what award he actually seeks. In the absence of such information, I am left to presume that he is leaving the matter solely to my discretion.

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[11] Ibid at [63]
[12] Care of Children Act 2004, s 3

COCA Costs Contribution Regime

[16] Unlike the DVA, COCA has introduced express provision concerning recovery from the parties of costs incurred by the Court. This is found in s 135A, which requires that where a lawyer has been appointed to represent a child, or as lawyer to assist the Court in COCA proceedings, the Court must make an order under s 135A, unless it declines to do so in accordance with that section. Similarly, where the Court has incurred costs relating to any report under s 133, the same cost recovery provision applies. In the present case, I am required by statute to consider the issue of reimbursement to the Crown of the costs of lawyer appointed to represent the children.

[17] Section 135A provides that unless the Court is satisfied that any order of recovery of costs would cause serious hardship to a party, or to a dependent child of the party[13], or unless, in view of all the circumstances of the case it would be inappropriate to require a party to pay the amount payable in the section[14], then the Court must require a party to pay what is referred to as the "prescribed proportion". Where the Court is satisfied that it would be inappropriate to require a party to pay such amount, the Court may order a different amount not exceeding the prescribed proportion.

[18] Section 135A(4) permits the Court to consider "the circumstances of the case", which may include the conduct of any party, and may substitute a difference amount. This creates a wide discretion, regulated around the circumstances of the particular case.

[19] The appropriate process for the determination of contribution to costs is outlined in *Green v Regan*[15], in which the High Court emphasised the need for parties to be afforded the right to be heard. Katz J confirmed the best practice was for the Registrar to inform parties of the amount of costs paid by the Crown, advise them of the statutory requirement upon the Court to consider reimbursement of the prescribed amount, or a different sum, and invite submissions within 21 days for reference to a Judge for decision in chambers.

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[13] Care of Children Act 2004, s 135A(2)
[14] Ibid s 135A(4)
[15] *Green v Regan* [2017] NZHC 1916, at [31]

[20] Against that summary of the legal principles on these matters, I turn to assess the relevant circumstances in the case before me.

Analysis

[21] In determining the various issues as to matters of costs, I have considered the detailed submissions filed by Counsel for each party and the respective submissions made by the parties in terms of the costs contribution process. I need not repeat in full the submissions filed by each party.

[22] As indicated in *P v S*[16], the exercise of the discretion on matters of costs must be undertaken by considering "all the surrounding circumstances in light of the purpose of the Act". The pathway of these proceedings displays the surrounding circumstances of this case. Various minutes and decisions made by me during this proceeding also record salient events that pertain to matters of costs.

Progressive Steps of these Proceedings

29 October 2015 – Proceedings Commence

[23] The proceedings commenced on 29 October 2015 when the applicant mother made without notice applications for a Temporary Protection Order, associated property orders and an Interim Parenting Order. Her applications were granted; a temporary protection order was made against the respondent, property orders made in her favour and she was granted the day-to-day care of the parties' two sons, [Charlie] and [Toby]. The respondent was permitted supervised contact.

Section 80 Hearing – 15 February 2016

[24] This first stage of the proceedings continued until a hearing allocated pursuant to s 80 of the Domestic Violence Act to determine the respondent's opposition to the protection order. That hearing was held on 15 February 2016 but, after the mother had been cross-examined by the respondent's counsel, the parties sought an adjournment of all proceedings, as they wished to explore therapeutic intervention to resolve the

[16] *P v S,* above n 2, at [28]

issues that had been occurring within the family. This was an appropriate course of action given that the incidents underpinning the applications were, and always have been, at the lower end of the sad spectrum that encompasses domestic violence.

[25] Having regard to all that has happened since 15 February 2016, if the applicant mother had tangibly supported her apparent commitment to the therapeutic approach, the proceedings should have been resolved by the mid to latter part of 2016, without further costs being incurred in the litigation. An analysis of the events since February 2016 displays why it was that the proceedings did not resolve as anticipated, and from where the cause of that impasse derives.

[26] The second period commenced on 15 February 2016 after these significant therapeutic initiatives, designed to improve relationships and guide a consensus outcome, were approved in principle. The goal was that these initiatives would bring to an end the proceedings and thereby obviate the need for ongoing Court events. Unfortunately that was not to be, the reasons for which are material to both issues of costs. This second period required various Court conferences, ones which were required to address the frequent obstacles (intentional or otherwise) created by the applicant to avoid achievement of the very goal which she had indicated she was prepared to consider, namely restoration of something akin to the previous care arrangements.

Approval of Therapeutic Approach – 8 March 2016

[27] The detailed therapeutic approach was incorporated within a joint memorandum dated 25 February 2016, which was prepared by the children's counsel, Ms Hickman. Ms Hickman put significant energy into developing and promoting a comprehensive therapeutic approach. She is to be commended for her responsible and committed approach throughout this proceeding.

[28] In this memorandum, the parties agreed they would engage a specialist therapist to work with the boys and the parents, with a specific aim of progressing the father's contact with each of the boys to the point where the child [Charlie] would resume unsupervised contact with his father. It was agreed that the cost of the therapist and of supervised contact would be met jointly. As a result of this promising and

positive approach, I found good cause pursuant to s 80 to adjourn the Domestic Violence hearing (which had been allocated to resume on 5 April 2016) in order to monitor the outcome of the family therapy. It transpires that the positive intentions of the respondent, his counsel, Ms Hickman and the Court in pursuing that course were not reciprocated by the applicant in the same positive manner.

[29] In terms of the agreed process, the parties engaged a very experienced psychologist, Dr Stephanie Dillon, to commence counselling of the boys and to ascertain how each felt about resuming their relationship with their father. It had been the plan that the child [Toby] would commence contact with his father and that Dr Dillon would arrange a joint therapeutic session between [Charlie] and Mr [Whitehouse], as a steppingstone to restoring that relationship.

[30] Unfortunately, it became apparent at the early stages that although Ms [Newton] would agree to a certain process, she harboured profound difficulties in then permitting aspects or the process, or the outcome agreements, to be enacted in practice. It is this impediment that forms the heart of the issue as to whether these parties, or one of them, should carry a share of the costs accruing.

LFC's Concerns 27 May 2016

[31] Problems of this nature became evident as early as May 2016. Ms Hickman filed a memorandum dated 27 May 2016, in which she detailed that the Dr Dillon reported that she had been unable to progress the therapeutic meeting between Mr [Whitehouse] and [Charlie] due to Ms [Newton] raising further safety concerns and not agreeing to the meeting proceeding. Ms [Newton] was unwilling to accept the professional views and recommendations of the very psychologist she and the father had agreed to engage. While parties do not have to follow automatically what any specialist tells them, in a situation where all evidence displays that Dr Dillon's recommendations were appropriate and sound, the mother ought to have supported the ongoing steps. The fact she has regularly impediment the positive pathway forward has had the direct result of frustrating the objects of the therapeutic initiatives and requiring unnecessary additional reference back to the Court, with significant incumbent cost.

[32] Ms Hickman recorded her 'serious concerns' about the failure to progress matters and her concerns about 'parental influence' on the boys. Given the father was not having any unsupervised contact with the boys at this stage, the only potential 'parental influence' was that of the mother. Ms Hickman added there was a risk of psychological harm to [Charlie] caused by the lack of contact with his father. In an effort to address this risk and impasse, she sought a direction from the Court that [Charlie] be 'presented' to Dr Dillon for the purpose of the therapeutic meeting with his father and that [Toby] could commence unsupervised contact.

[33] While noting LFC's request for such a direction, given the mother was not agreeing to accept Dr Dillon's recommendations or the position of the boys' own counsel, the Court had no alternative than to allocate a judicial conference to enable the mother's objections to be heard and considered. The Court had no jurisdiction to make such a direction of its own motion, instead had to set Court time to hear from all interested parties. The necessity for Ms Hickman to make this request and for the Court to allocate Court time arose solely as the result of the mother's own anxieties or incapacity to endorse the very strategy that she had agreed to partake in. There were no actions by the respondent which created unnecessary steps or cost.

Allocation of Urgent Conference

[34] On 2 June 2016 I issued a minute referring to Ms Hickman's memorandum which had detailed the difficulties. I recorded that the Court had, on previous occasions, adjourned scheduled hearings in order that the parties could explore counselling and settlement. While I noted Ms Hickman's request that I make certain directions, I recorded I had no jurisdiction to make unilateral directions as sought. Instead, I recorded that the mother was entitled to be heard on the matter but, in so doing, stated that if the mother refused certain steps then she exposed herself to costs award for costs accruing. I indicated that unless both parties consented to the directions sought by Ms Hickman then an urgent judicial conference would be allocated on 16 June 2016.

[35] Despite clear opportunity for the mother to reconsider her position and agree to the recommendations, she did not accede to what Dr Dillon had recommended and

Ms Hickman had supported. A judicial conference was therefore required and allocated, with all the resulting cost.

16 June 2016 - Judicial Conference

[36] I provided a detailed minute as to the outcome of the judicial conference held on 16 June 2016. I noted that the father had been charged with a breach of the Protection Order, and observed that it was at the extremely low end of possible breaches, an observation which is readily confirmed by the fact that he later received a s 106 discharge without conviction in the criminal jurisdiction. It seems the father had cancelled a proposed family holiday, an event which was determined to be a breach of the protection order.

[37] I recorded that in respect of the Domestic Violence Act proceedings, the point had been reached where it should be "crystal clear" to the parties as to whether an ongoing order was necessary. As the issue had not been resolved I directed that a hearing of 4 to 5 hours was to be allocated to determine the adjourned proceeding. In so doing, I warned that matters of costs would be considered. I considered each party's position in respect of what Ms Hickman had been seeking and made an interim order in respect of [Toby]'s contact and in respect of [Charlie] so that he would finally be able to partake in the initial session to be undertaken under the guidance of Dr Dillon.

[38] While consent to these ongoing steps and orders was forthcoming, there was never any reasonable need for these matters to have required the intervention of the Court; a detailed strategy had been previously agreed, Dr Dillon had liaised closely with LFC and the parents as to progress and Ms Hickman had stated her position in clear terms. The only need for this conference arose from the unreasonable position of the mother and her entrenched difficulty in endorsing what was obvious.

Resumed s 80 Hearing – 18 October 2016

[39] The resumed hearing to determine the Domestic Violence Act application and progress of matters of contact, was allocated for 18 October 2016. By this stage, the father had received the discharge without conviction for the breach of the protection order, an outcome which indicated that the breach of the order was minor in nature. It

was not a breach which could ever sustain a view that the boys should not immediately restore a full relationship with their father.

[40] At the resumed hearing Ms Hickman again stated her position in a clear and unequivocal manner. Unfortunately, it was again evident that the only impediment to progress of matters towards an appropriate outcome was the internal struggle of the applicant mother. She would not accept the appropriateness of Hickman's views, despite those views being reasonable by reference to the information and circumstances known at the time. It was only on the eve of that hearing that Ms [Newton] had eventually indicated her acceptance that there was no longer any need for the protection order to continue. Again, the need for this hearing to be allocated arose solely as a consequence of the mother being unable to accept an outcome which the evidence had long demonstrated to be the only appropriate course of action in all circumstances. It must be noted that Ms [Newton] had from 16 June 2016 until the hearing on 18 October 2016 to have recognised there was no need for the ongoing order and thereby avoid the significant cost thereby accrued by her position. Her incapacity to act responsibly to the tangible information available to her caused the costs of this hearing.

[41] The decision issued by me on that day also commented upon the significant dynamic at play whereby the mother was permitting her anxieties to rule her thinking and decision making. This dynamic was to such degree that Ms Hickman expressed concern that the anxieties were beginning to affect Ms [Newton]'s own well-being.

[42] Despite opportunity at that hearing for resolution, the issue as to the nature of the children's contact with the father remained to be resolved, for which I listed the matter for a case management conference on 12 December 2016. I required the parties to file a joint memorandum detailing their respective positions and their reasons for such positions. I again recorded concerns as to the costs which were accruing, and recorded that the parties and the Court had expended a considerable sum of money in these matters. I reserved the issue of recovery of costs in respect of all proceedings, both between the parties and matters of recovery of costs incurred by the Court.

Dr Dillon's email 25 November 2016

[43] A significant event arose in November 2016 when Dr Dillon achieved what everyone believed to be a comprehensive agreement for restoration of the boys' relationship with the father. This perceived agreement is displayed in an email from Dr Dillon dated 25 November 2016.[17] Dr Dillon advised Ms Hickman that she had met with both parties the previous day and that, although there remained a difference of opinion as to past matters, the parties were agreed on a 'move forward'. She then detailed a comprehensive agreement, incorporating 14 components, the most significant of which was the parental agreement that week about care would 'commence immediately', with changeover occurring on [day deleted]. It is significant that there were no pre-conditions to the week about arrangement resuming.

[44] Despite, again, this apparent clear agreement forward, the mother's continued to frustrate her implementation of her own agreements and it would not be until 12 June 2017, an astounding 7 months later that it would finally be accepted by Ms [Newton].

Case Management Conference – 12 December 2016

[45] The case management conference (CMC) proceeded on 12 December 2016. A joint memorandum had been filed on 6 December 2016, which confirmed that agreements had been reached as detailed by Dr Dillon. The memorandum, which was signed by all Counsel, recorded each component of the purported agreement and expressly noted each part that Ms [Newton] had agreed to. However, despite Dr Dillon's report indicating an immediate restoration of shared care, the mother stated in the memorandum that she sought a transitional approach. The points in issue as stated in the memorandum were, in the scale of this dispute, so minor that everyone likely anticipated final resolution at the Case Management Conference.

[46] Against that background, as I recorded in my minute of such date, I was therefore "somewhat taken aback" that, at the very commencement of the conference, Ms [Newton] presented three new concerns, all of which were clearly raised as

[17] See Attachment to Submissions of Mr Davies 28 June 2017

obstacles to ability to implement the agreement reached with Dr Dillon in November. This was despite the fact that the joint memorandum filed a mere six days before the conference made no reference to two of these new matters.

[47] Her Counsel's explanation[18] for leaving it until the CMC to raise these new issues was that it had been his client's intention to address these issues at counselling. This explanation is somewhat creative. In his submissions on costs, Mr Casey suggests that these new matters were somehow irrelevant to ongoing care or contact arrangements, that they were merely peripheral issues which the parties could address at counselling. That position does not withstand scrutiny. First, while the joint memorandum of 6 December portrayed a picture where his client was comfortable with Mr [Whitehouse] recommencing significant unsupervised care of the children, the three new matters raised by her at the commencement of the conference posed an immediate obstacle to that course of action. To suggest otherwise is disingenuous. For instance, despite her apparent agreement in the joint memorandum to reinstatement of a level of unsupervised care, the new 'concerns' included a vague assertion that Mr [Whitehouse] had somehow bathed one boy in an inappropriate manner and that the father had sought to coerce the other son to say things about her.

[48] If there had been any factual merit to such assertions, then it rendered the pathway proposed in the joint memorandum redundant. It was clear the mother was asserting forms of inappropriate behaviour by the father with the only consequence being to put a halt to unsupervised care. I do not accept as credible, Mr Casey's submission that the mother raised these matters only as discussion points for counselling. They had significantly greater relevance to the care arrangements than mere topics for counselling. They were designed as impediments to frustrate the way forward for these boys and the father.

[49] While there may often be supervening events which create a reasonable explanation for an altered position, this was not the case here. There was no merit to her new concerns. They arose from her anxieties dominating her appreciation of what was reasonable and appropriate. As a consequence of this repeated tack, I recorded

[18] Submissions by Mr Casey 28 July 2017, at para

concern as to what was driving the mother's position, especially given that this case management conference was set specifically for the purpose of bringing to finality to an already unreasonably protracted set of proceedings.

[50] The minute issued that day records the detailed concerns I held as to her position. Ms [Newton] sought yet a further period of adjournment, with a review of proceedings to occur, despite the fact that these proceedings had commenced well over a year prior to that conference and there was no reasonable basis for further protraction.

Timetable Directed

[51] Her 11th hour intransigent position left no alternative than to advance matters towards a hearing, for which I specified a precise timetable of final evidence. I again recorded that costs would be considered at the conclusion. I recorded that I was extremely surprised that final agreements could not have been reached at that conference and, for the avoidance of any doubt, stated that the inability to reach final agreement was solely as a consequence of the mother's unreasonable and unsustainable position.

Non-Compliance by Applicant

[52] Notwithstanding the timetable directions were made solely as a consequence it being the applicant who was requiring a hearing, she failed to comply with them.

[53] In a minute of 14 February 2017 I recorded that the mother had not complied with the timetable and recorded my concern that this appeared to be a deliberate tactic to delay, even further, the inevitable hearing to bring matters to an end. I gave her until 27 February 2017 to file her evidence, failure to comply would lead to strike out.

[54] She filed her affidavit on the very last day of that timetable. This necessitated a further case management conference, this being allocated on 12 June 2017.

Case Management Conference - 12 June 2017

[55] The conference proceeded on that date and the parties were present. I recorded that proceedings had been protracted largely because Ms [Newton] had 'struggled to accept that the father's relationship with the boys should resume and increase the way it ought to have a long time ago'.

[56] I stood ready to advance the matter to a hearing on 26 July 2017. However, the parties indicated a wish to discuss matters before that hearing was allocated. After some five or so hours of negotiation, the parties indicated they had reached final consensus on all issues. I went to considerable lengths to ensure that each of the parties was entirely comfortable with that outcome.

[57] In endorsing the agreements I recorded that I was particularly concerned regarding Ms [Newton] and whether she was able move forward and "act with integrity upon the arrangements she has consented to, one made after she received competent legal advice". Given the history of her extraordinary difficulty in acting responsibly on earlier occasions, I was concerned as to the possibility that she would not carry through the agreements reached by her. I was assured that she would do so.

Final Agreements Reached

[58] Final orders were made and directions were made for filing of submissions as to all matters of cost. Submissions have been filed, both in terms of inter-party costs and recovery of Court incurred costs under s 135A Care of Children Act.

Consideration of Relevant Factors

Are Costs to be Punitive or a Deterrent?

[59] Any consideration of costs must be assessed from a compensatory perspective rather than a punitive one. I do not agree with Mr Casey's submission that "the nature of costs is to provide deterrence", as such an approach could easily dissuade a party from prosecuting a reasonable case. Instead, the primary purpose of a costs award should be compensatory in nature, determined by reference to all proper and relevant circumstances.

[60] In the unique circumstances of the present case, I had provided various warnings as to the real potential for cost implications and did so at stages where the evidence then available readily indicated what the appropriate outcomes might be. The applicant was entitled to proceed against such warnings to prosecute her case, as a party is entitled to test evidence. But where a party does so in a situation where the merits of a case have been canvassed to the degree evident in this case, they must face close scrutiny for recovery of costs incurred as a consequence any failure to act upon the reality of the evidence available at the time, especially where the liability for exposure to costs has been expressly brought to their attention.

[61] The amendments to legislation over recent years have intentionally introduced steps at which the strength, or lack thereof, of a party's case may be discussed. The 2014 amendments to COCA were driven by a justifiable concern that many cases before the Family Court were, like the present, being unreasonably protracted. For instance, the amended Family Courts Rules introduced a range of conferences, designed to advance proceedings and test positions. Rule 416Z directs that the purpose of a Directions Conference is to enable a Judge to make "the orders and give the directions that are necessary to ensure that the hearing takes place as early as possible…". A similar purpose is found for other available conferences. This case advancement philosophy was not so proactively stated in previous rules.

Applicant's Submissions – Impact on Her

[62] Mr Casey submitted that the nature of the respondent's application for costs is punitive, that it is not focused on the care of the children and has a potential detrimental effect on the applicant's ability to earn and support the children. He submitted that costs should "lie where they fall", a submission which, in the context of the circumstances of this case is inappropriate. Mr Casey argues that a significant financial and emotional cost has befallen the applicant, to the point where she has no desire to return to Court. Her belated appreciation of these predictable outcomes is unfortunate. It ignores the impact of her decisions upon the respondent, her sons and the Crown.

[63] In her submissions on the costs contribution issue she likewise demonstrates a significant incapacity to appreciate that it was her inability to reasonably appraise the information and progress throughout the proceeding that caused the inevitable costs. This submission is very much rooted in her sense that she and the boys were the victims and that any award of costs enhances distress upon them. While it cannot be disputed that there were aspects of inappropriate behaviour by Mr [Whitehouse], the applicant struggles to appreciate that those behaviours were isolated, were very quickly abated and that familial relationships deserved to be restored many months before she permitted them to occur. In the full context of this case, the adoption of the position of a victim is an unreasonable diversionary tactic to draw attention from her own actions, ones which so heavily impacted her sons and the respondent.

[64] Her reference to the financial and emotional costs she has now suffered carries an element of minimisation for her flawed decisions, in the sense that she seeks to utilise the very product of her frustration of the proceedings as a reason why she should not be the subject of an award. This is the case with the applicant cannot say that the parties were not warned of these realities. Throughout the process, Ms Hickman stated her position in clear terms, a position which was reasonable and accurate throughout. On five occasions[19] I expressly recorded the real potential for exposure to costs because it was apparent that the applicant was advancing untenable positions and in a manner which unquestionably increased the financial cost to all concerned. It is rare that such repetitive statements as to exposure for costs have been made in such a manner, such rarity reflecting the depth of the applicant's rigidity.

[65] Regrettably, the applicant failed to readdress her position, instead continuing to advance her untenable position despite the impact upon the children and despite the inevitability of increased financial cost to all concerned. It is somewhat unfortunate that she now relies upon her failure to resolve matters much earlier as a ground in support of an outcome that she should not pay anything towards the costs which have accrued as the result of her failures.

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[19] Minutes 2 June 2016 (para 5), 16 June 2016 (paras 10 & 12), 18 October 2016 (para 31), 12 December 2016 (para 27) and 14 February 2017 (para 2)

Means of Parties

[66] In terms of the respective means of the parties, the applicant has a modest income of approximately $40,000.00 net per annum. She has weekly expenses and outgoings which exceed her net annual income. She states she has $5000.00 of savings and significant debts, including $70,000.00 legal bills incurred in 2016. She says she has spent her relationship property settlement on that debt. It cannot be ignored that a reasonable proportion of the significant debt she has incurred for legal fees was a product of her own actions and decisions.

[67] Her submissions in respect of the cost contribution issue contain a statement of her financial position. This indicates she has a mortgage debt to the '[Trust name deleted]', of [almost $600] per week. While she states that she has an interest in that Trust she does not give any greater detail as to the mortgage. For instance, is that payment one where she is effectively meeting a third party loan advance, or is it a loan advance from an entity to her from an asset originating from her? It is unclear.

[68] The applicant received in excess of $190,000.00 as part of her settlement of relationship property entitlement and also has an entitlement to a superannuation benefit of $AUD50,000.00, such apparently not vested until she turns 65.

[69] The respondent informs that he has a net annual income of $85,000.00 and, like the applicant claims annual expenses which exceed his annual net income. The expenses claimed by him likewise appear to be reasonable in quantum. His assets appear to be greater than those of the applicant.

[70] From the information that has been provided by the parties, it is reasonable to conclude that both of them have moderate assets and income, with the respondent likely having more than the applicant in both respects.

Actual Costs Incurred

[71] As indicated, the applicant claims that she has incurred legal costs in these proceedings in the vicinity of $37,000.00, and has incurred $20,000.00 in the relationship property dispute. While Mr Casey submits his client has incurred costs

of $57,000.00 "with regards to the proceedings", that is inaccurate in that the costs incurred in the property proceedings are not subject to this decision. They may be relevant as to his client's general wherewithal to cover her debts, but are not relevant to this determination. In any event, I note from Ms [Newton]'s submissions on the s 135A matter that she advises she 'spent' $70,000.00 of her relationship property settlement on legal costs to Carlyle Dowling in 2016, which suggests that her liability for legal costs has been extinguished.

[72] The respondent advises he has incurred costs in these proceedings in the vicinity of $49,000.00 plus GST and disbursements (which would equate to approximately $57,000.00). He has also referred to having paid $7475.00 in respect of the criminal proceedings for breach of the protection order. I do not believe it is appropriate to have regard to the costs incurred in another jurisdiction except where a debt remains which may impact a party's ongoing expenses. In any event, just as with the applicant, it appears from his submissions on s 135A that he has no residual debt for legal costs.

[73] Mr [Whitehouse] states he has also met the costs which were incurred in supervision of his contact notwithstanding that the parties had earlier agreed that such costs would be funded on a joint basis. The respondent believes he has paid a significantly greater share of the costs charged by Dr Dillon. However, beyond those general statements, I have not been provided with the exact sums of what the costs were and whether, in fact the respondent has carried liabilities for which the applicant ought to have paid. I therefore confine my determination to the costs incurred in the Court proceeding, rather than ancillary costs which either party may have incurred.

Conduct in the Proceeding

[74] As noted from the abundant legal authorities, an aspect which the Court should have regard to is the way in which the parties (or their advisors) have conducted the proceeding and whether the proceedings were made unnecessarily complex or protracted because of stalling tactics, or procedural ploys, adopted by a party.

[75] I have already recorded my extensive reasons in support of the view that the proceedings in this case were unnecessarily and unreasonably protracted because the

applicant was incapable, despite competent legal advice, of entering into a reasonable settlement much earlier than transpired to be the case. I emphasise that this is not a situation where the applicant acted unreasonably throughout the life of the proceeding from its inception to its end. The events which led to the commencement of the proceeding were ones which she had good cause to be concerned about. However, it is expected of litigants, whether they be concerned with child welfare or protection from domestic violence, to adopt a reasonable and responsible assessment of their position as circumstances and events change throughout the pathway that Court proceedings often take.

[76] In the present case it became readily apparent early in the proceeding that the respondent was most unlikely to pose any future risk to the emotional, psychological or physical safety of the children, or the applicant.

[77] That finding is supported by the applicant's own entry into a specialist therapeutic approach and her agreement to a progressive approach to reintegration of the father with the children. Her entry into that arrangement was entirely appropriate having regard to all circumstances at the time. What was not appropriate was her repetitive failure to implement the reasonable outcomes of that process.

[78] The point at which she failed to act as a responsible litigant should, occurred shortly after her entry into the therapeutic programme. On one hand she portrayed that she was acting reasonably by entering into that sensible mode of intervention but, on the other hand, failed to respond by seeing through the very outcomes which such approach was intended to carry. I emphasise that if there had been material events which had intervened in a way which justified her resistance to accepting the outcomes, then no one could view her as acting unreasonably. There were no such intervening events in this case. The singular most potent cause of the ongoing costs since the therapeutic intervention commenced was the incapacity of the applicant to accept the positive outcome of that intervention and thereby bring both sets of proceedings to an end. The same dynamic in her approach was evident at certain Court events where she raised 11th hour obstacles to progression in a way commensurate with all objective material available to her.

[79] While the applicant may point to events, such as the fact the respondent was charged with a breach of the protection order, the nature of the breach was in the realm of a technical breach and was viewed by the District Court Judge as being minor to the level that no conviction was entered. It was never of such level that could merit the restoration of familial relationships. That event aside, there were no actions of any kind by the respondent from the time when the orders were first made against him that merited the firm stance taken by the applicant throughout the journey to final resolution. His frustration at the unreasonable protraction of proceedings was evident, but it was displayed in respectful and appropriate ways and did not undermine the progress he had made towards an outcome beneficial to his children.

[80] It requires to be emphasised that there was no reasonable evidentiary foundation for the significant delays occasioned in restoration of his relationship with his sons. Rather, it is regrettable that the Court process was utilised in the way that delayed an expeditious and appropriate restoration of that important relationship. An analysis of the Court file displays the considerable lengths taken by the children's lawyer and by the Court to overcome the obstacles that were being created due to the unfortunate and unrealistic position of the applicant.

[81] It follows that this is a case where the way in which the applicant conducted her case, and the unnecessarily protracted steps taken by her, have inevitably caused an increase in costs well above that which would have been incurred if she had embraced the therapeutic approach with the integrity and honesty it merited. The generous interpretation of the events is that her inability to do that derived from her anxieties. However, where such anxieties are not commensurate with the circumstances at play, the respondent is justified in asking that the applicant make a contribution to the costs accruing from her actions.

Welfare and Best Interests of the Children

[82] The applicant argues that a costs award against her would be adverse to the welfare and best interests of her children. Unless a party is possessed of significant financial wherewithal, it is an inevitable consequence that a costs award will impact upon the level of financial resource a party has to provide for the needs of their

children. I am not blind to the fact that the applicant receives a modest income and normal expenses to provide for herself and the children. There is however some irony in the fact that she now relies upon the welfare and best interests of the children as a ground for not awarding costs against her in a situation where, if she had made decisions much earlier in the process based upon the very same principle, she would have likely have incurred a much smaller legal services debt and reduced her liability for costs.

[83] Put another way, the very reason why the parties and the Court have incurred such considerable costs has arisen because the applicant delayed to act in a way commensurate with what all the available evidence and information demonstrated to be an outcome in the welfare and best interests of her children.

[84] On the information that has been provided by each party, I am not led to a conclusion that an award of costs against the mother would negatively impact upon her ability to meet the needs of the children. Similarly, if no award was made in favour of the father, while that may cause him some fiscal consequences, there is nothing to show it will cause a negative impact upon the welfare of the children.

Purposes of Relevant Legislation

[85] In terms of the objects and purposes of the legislation under which the proceedings were conducted, I commence with the Domestic Violence Act. The objects are contained within s 5 and the Court of Appeal in *Surrey v Surrey* observed[20] that the overarching objectives of the act are to reduce and prevent domestic violence by recognising that domestic violence in all its forms is unacceptable and by providing effective legal protection for victims. The Court stated that the aims of the Act are protective and preventative and driven by the underlying philosophy that domestic violence in all its forms is unacceptable.

[86] The High Court in *P v S* observed[21] that the principal purpose of the Act is to ensure protection for victims of violence and provide access to the Courts in as speedy

[20] *Surrey v Surrey*[2008] 2 NZLR 581, at [98]
[21] *P v S,* above n 2, at [25]

and a simple a manner as is consistent with justice. In terms of how those purposes impact upon matters of costs, Woolford J held[22] that the general rule that costs ought to follow the event is inconsistent with the purpose and provisions of the Domestic Violence Act. He considered it would be wrong in principle to make an adverse order for costs against a person who advanced an application for a protection order in good faith and that awards of costs against applicants who bring applications in good faith are counter-productive and will serve only to discourage applications for protection orders.

[87] In the present case, the issue is not one of whether the initial application for a protection order was properly made or not. Although the respondent might hold to a view that the applicant ought never to have made such application, she was acting in good faith in circumstances where it could not be said that her application was without merit. The respondent did act responsibly in permitting the protection order to continue once the therapeutic initiative was agreed and, up until that point at least, the applicant was acting in what appeared to be a reasonable and appropriate manner.

[88] The central focus in this proceeding is one of timing and assessing whether there is a case for a costs award from the point where it ought to have been clear to the applicant that there was no reasonable basis to hold to a view that a continuing order was necessary, either for her or for the children.

[89] Court proceedings do not operate as a continuum, where the circumstances remain constant throughout. Rather, it is a process where events and circumstances change throughout, in terms of the evidence that is presented and the behaviours of parties. Both parties, as responsible litigants must act not merely with good faith, but with a responsible response to the fluid nature of information that is forthcoming during the life of the proceedings. This consideration is not at odds with *P v S*, as that decision is not authority for a proposition that an applicant for protection is automatically absolved from liability for an award regardless of how their case is prosecuted. It held that in Domestic Violence Act proceedings, like COCA proceedings, costs should not follow the event as they might do in civil proceedings.

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[22] At [26]

The decision may be seen as emphasising that an award of costs against an applicant ought not be lightly made.

[90] A similar perspective must be taken with regard to the proceedings under the Care of Children Act, namely that costs do not follow the event and that it is wrong in principle to make an adverse award of costs against a parent who advances a genuine and responsible argument in what he or she regards as the best interests of the child. Again, the primary issue in this case is the matter of the time it took for the applicant to recognize and respond to the wealth of evidence available to her to display that her continued resistance to an obvious outcome was without foundation. I take no issue with the steps taken by her in the initial months of these proceedings, under either Act. Instead, the focus is firmly upon her lack of responsible recognition of the significant deficits in her case as it progressed.

[91] The point where her participation in proceedings departs from that which should attract protection under the objects of purposes of the respective legislation is from the point where the parties, with the support of Lawyer for the Children and the Court, entered into the proactive therapeutic initiative. It is the actions of the applicant in terms of how they impacted upon the incumbent costs, from that juncture that are of concern. In temporal terms the crux point occurred by the time of the judicial conference on 16 June 2016, when it was clear that the father-son relationships should be restored.

Decisions

Introduction

[92] By way of overview, the current proceedings involve a situation where an applicant had acted for the initial period in good faith and with a responsible manner but, when circumstances have changed in a positive way, her incapacity to respond to the circumstances reached a degree which was irresponsible and unreasonable and became the sole cause of a significant increase in cost to all parties, her included.

[93] The actions of this applicant are ones which, having regard to the purposes of the respective legislation, ought not attract protection afforded by those statutes for the

periods when she failed to act responsibly. Conversely, she should be protected against costs for the initial period when she acted in good faith and in the interests of the children.

Inter Party Costs

[94] Having considered all the principles applying to the exercise of the discretion as to costs to which I have referred, I am led to a conclusion that the respondent is entitled to a modest contribution to the costs incurred by him in respect of the Domestic Violence Act and Care of Children Act proceedings from the Judicial Conference held on 16 June 2016 until the conclusion of both proceedings on 12 June 2017. I select that start date as it was very clear by that date that there was no need for an ongoing Protection Order and the reintegration of the father with both children ought to have commenced without the reluctance that was displayed in this case.

[95] While the respondent Counsel's submissions appear to infer that he seeks indemnity costs, there is no basis for either indemnity or increased costs made out, especially when the views of the High Court emphasise that a purely civil approach is misplaced in proceedings such as this. As indicated, the respondent has given no indication as to what costs calculated according to scale would have been for any period of these proceedings, or indeed actual costs for such a period. Accordingly, I am unable to specify an exact quantum for the order.

[96] In terms of the issue of inter-party costs I order;

(a) For the period from the commencement of proceedings until 16 June 2016 costs are to lie where they fall,

(b) For the period from 16 June 2016 until 12 June 2107 the applicant is to pay to the respondent costs calculated on a 2B basis. The respondent's Counsel will need to file a Memorandum detailing the calculation of costs for that period, whereupon an Order shall issue accordingly as to the precise quantum.

Costs Contribution Order

[97] In respect of whether either party should be ordered to reimburse the public funds for costs incurred by the Court pursuant to s 135A COCA, I commence with recording the costs incurred. The Court paid $17,631.09 for the costs of the children's lawyer and $1,195.07 in respect of the initial inquiries made by a psychologist appointed under s 133. In terms of the total cost, the 'prescribed amount' for which each party is prima facie liable is $6,274.76.

[98] The first consideration is whether serious hardship would be caused to either party or a dependent child. I have had regard to their respective submissions and means, and to the criteria in s 135A, particularly the definition of 'serious hardship' in s 135A(5) and the wider discretion in ss (4) as to any substituted amount. On the information provided by each party there is nothing which could support a conclusion that any of the indicated grounds of hardship exist. While the applicant has a modest income and asset situation, it is not possible to conclude that she or either child is facing significant financial difficulties of the type stated. Similarly, there is nothing to demonstrate serious hardship to the respondent.

[99] There are however, a range of factors that require consideration under s 135A(4). These are;

(a) Although Mr Dwyer was appointed to provide a psychological report under s 133, his involvement ceased when the parties agreed in February 2016 to pursue a therapeutic initiative with Dr Dillon,

(b) The parties met the cost of Dr Dillon. While the respondent states he believes he paid 'considerably more' towards these costs than the applicant, no detail was provided. In the absence of such detail, I am left to conclude that, whatever the shares, the parties met this cost,

(c) The fact the parties incurred the costs of an initiative which assisted in the eventual resolution of the proceeding, is a factor relevant to the discretion as to whether they should also meet the costs of the s 133

reporter. It is my determination that in such a situation, neither party should be levied for that component of the costs incurred,

(d) In respect of Lawyer for the Children's costs, the initial need for such counsel did arise from the respondent's actions with the children, especially [Charlie]. However, by early 2016 both parties recognised the benefit of the therapeutic initiatives,

(e) In terms of 'conduct of any party', from February 2016 the respondent acted with reasonableness in terms of these proceedings. Although he was found to have breached the Protection Order, it was plainly a very technical breach and the charge was dealt with accordingly by the District Court. Of relevance to costs, in terms of the Family Court proceedings he carried through with his commitments to the Court,

(f) As described in the narrative of material events, the steps that had to be taken by the Court from June 2016 until 12 June 2017 were required solely as a result of the applicant's incapacity to shift position. The applicant received a variety of clear warnings that if she did not carefully consider and responsibly act in response to the wealth of information available to her then she would face very close scrutiny when it came to consideration of costs. Unfortunately, that did not encourage early acceptance of the need to resolve matters,

(g) If she had responded to the positive progress of Dr Dillon's involvement and followed her recommendations and the position of Ms Hickman, these proceedings ought to have concluded by settlement by mid to late 2016. Without question, they ought to have settled after Dr Dillon's mediated settlement of 25 November 2016. There was no reasonable basis for the applicant to protract matters until June 2017, with the significant fiscal consequences that followed.

[100] It follows form the analysis of the salient events as they altered throughout the life of this file, that the respondent must carry some responsibility for the fact that

Court proceedings were required at the outset. However, the applicant cannot avoid responsibility for the unnecessary increase in costs. The issue is as to what a fair contribution should be in all the circumstances of the case.

[101] Having regard to these full circumstances, the respective means and conduct of the parties, the end point is a global exercise and discretion. I also take into account that the applicant has incurred her legal costs and scale costs for a large part of these proceedings. The respondent has also incurred significant costs and, as observed, acted reasonably throughout. I determine pursuant to s 135A(4) that amounts different to the prescribed proportions ought to be paid as follows;

(a) The applicant is ordered to pay the sum of $4,000.00 towards costs incurred by the Court, and

(b) The respondent is ordered to pay the sum of $2,000.00 towards such costs.

Delivered at am/pm September 2017

P J Callinicos
Family Court Judge