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, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2012-044-000177
[2019] NZFC 8723

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[MELBA HARMON] Applicant
AND	[TREVOR HARMON] Respondent

Hearing:	22 October 2019
Appearances:	No appearance by or for the Applicant A Morahan for the Respondent V Crawshaw QC as Counsel to Assist A Cooke as Lawyer for the Children
Judgment:	24 October 2019

RESERVED JUDGMENT OF JUDGE L J RYAN
[Admissibility of affidavit]

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[1] This interlocutory hearing was allocated to determine whether an affidavit of psychologist Kate Burke filed in support of the respondent was filed with leave and, if it was, should it remain on the file? This direction was made by Judge McHardy on 15 August 2019.

[2] The day before the hearing, written submissions were received from the lawyer representing the children and from counsel to assist the Court and from the respondent's counsel. I also considered a memorandum from the applicant, who is unrepresented, wherein she sought to have the hearing adjourned. I had decided to consider the issue of the adjournment request at the commencement of the hearing.

[3] It transpired, however, that the applicant failed to present at Court and she did not participate. I declined the request for an adjournment and proceeded to hear the matter by way of a submissions only hearing. My reasons for refusing the adjournment are:

(a) I had the benefit of submissions from both the lawyer for the children and, more specifically, from counsel to assist the Court on the issue of admissibility which addressed all the questions and the law around the issue.

(b) The substantive hearing is scheduled for 18 November, and I am the presiding Judge. The issue of admissibility is one that should properly be heard by the presiding Judge, hence the case being scheduled before me. As I will not have the opportunity between now and the commencement of the substantive hearing to hear this interlocutory application, it was essential for me to determine the matter now.

(c) Whilst the applicant may have only just received counsel for the respondent's written submissions because they had been posted to her and she had not received them directly but only via other counsel, there was still an opportunity for the applicant to have appeared at Court and addressed any of the issues she wished. She chose not to.

[4] Kate Burke is a clinical psychologist who does prepare reports pursuant to s 133 of the Care of Children Act. In this instance, Kate Burke had not been engaged by the Court to complete a s 133 report. Instead, she had been approached in late 2017 by the respondent's counsel who requested, pursuant to r 429, copies of the two s 133 reports completed by Dr Sarah Calvert. On 12 May 2019 the affidavit in question,

sworn the same day, was filed. The issue I have to resolve is whether that affidavit is admissible and, as Judge McHardy noted in his directions, had leave been granted for it to be filed?

[5] It is necessary to record a little bit of the background to put the issue in context. Judge Burns on 7 December 2017, upon receipt of the request under r 429, gave permission for the two s 133 reports to be released to Kate Burke as sought. The Judge subsequently issued a minute on 18 December 2017 as a result of a representation from the applicant's then counsel, Mr Cummings. The direction reads as follows:

> The letter from counsel for the respondent requesting permission for a psychologist to read the s 133 report is required by the Family Court Rules to be copied to the applicant. When I received the request on 7 December and in the absence of any objection I dealt with it accordingly, I assumed there was no objection. Objection has now been raised. The memo from Mr Cummings dated 14 December says the letter from Mr Morahan was not copied to him. This is of concern to the Court. Therefore the direction of the Court dated 7 December is suspended. I direct Mr Morahan to reply to the memo of Mr Cummings by 15 January 2018. I direct the reply be placed before me. I will then decide what further directions are needed.

[6] Judge Burns then issued a further minute on 1 February 2018 referring to Mr Morahan's response, which he had filed as directed. The Judge observed that Mr Morahan had failed to explain why Mr Cummings had not been served with the r 429 request. The Judge then said this:

> Accordingly the suspension order remains in force and I rule any evidence from Ms Burke is inadmissible until a ruling is made by the Court allowing it to be admitted. Mr Morahan on behalf of his client will have to file an interlocutory application seeking permission to access the report and serve it on [the applicant] giving her a right to be heard.

[7] No application has been filed by Mr Morahan seeking permission to access the report.

[8] It is Mr Morahan's submission, however, that a clear inference can be drawn from a minute issued by Judge Fleming on 17 May 2019 that the affidavit was admissible and could form part of the evidence. He says that at the telephone conference convened by Judge Fleming for the purpose of the allocation of a fixture there was a discussion with counsel which in part incorporated comments around Kate Burke's affidavit. It appears that Mr Cummings at the telephone conference

raised no objection to the affidavit forming part of the evidence. However, that was the extent of it. There was no ruling in the minute issued by Judge Fleming as to the admissibility of the affidavit. The Judge did authorise the lawyer for the children to "consult an independent psychologist as to contents of Dr Burke's affidavit to take advice on cross-examination".

[9] I reject Mr Morahan's submission that Judge Fleming granted leave for Kate Burke's affidavit to be admitted into evidence. Had she done that, she would have had to give reasons for why she found it admissible. It is obvious to me that Judge Fleming was not aware of Judge Burns' minute of 1 February 2018 whereby he had ruled any evidence from Kate Burke was inadmissible. It was also clear that it had not been drawn to Judge Fleming's attention that an interlocutory application was required to consider the issue.

[10] As a result, I find that leave to file the affidavit of Kate Burke has never been granted.

[11] Treating this interlocutory hearing as an application for leave to be granted, the question is, should the affidavit be admitted into evidence for the purpose of the substantive hearing?

[12] As Mr Morahan pointed out in his submissions, Kate Burke received the two s 133 reports almost immediately permission was given by Judge Burns on 7 December 2017. He submitted that by the time Judge Burns ruled that any evidence from Ms Burke would be inadmissible, she had read the two reports and she could not "unread them".

[13] I agree with that submission, but that being the case, Ms Burke should never have, over a year later, sworn an affidavit in support of the respondent, especially when Judge Burns had ruled that any evidence from her was inadmissible.

[14] The filing of the affidavit was direct non-compliance with Judge Burns' direction of 1 February 2018.

[15] It is clear from the provisions of s 133(10) – (15) that there are very strict controls around the release of s 133 reports for very good policy reasons. I set out below the provisions of s 133(10) through to (15):

> **133 Reports from other persons**
>
> *Second opinions*
>
> (10) The approval of the court must be obtained before a second opinion may be prepared and presented.
>
> (11) The court may give approval only if there are exceptional circumstances.
>
> (12) A party who obtains the approval of the court for the preparation and presentation of a second opinion is liable for the costs of that opinion.
>
> (13) If the court gives approval, it may permit disclosure of the materials to the psychologist preparing the second opinion subject to any terms and conditions that the court considers appropriate.
>
> (14) If the court declines to give approval to a party, or if a party does not seek approval, the court may permit disclosure of the materials to a psychologist who is employed by the party and who is not the report writer.
>
> (15) The court may—
>
> (a) permit disclosure, under subsection (14), of the psychological report prepared by the report writer only if the court is satisfied that the psychologist requires the report to assist the party to prepare the party's cross-examination; and
>
> (b) permit disclosure, under subsection (14), of the report writer's notes and other materials that the report writer used in preparing the psychological report only if the court is satisfied that—
>
> (i) the psychologist requires those notes and other materials to assist the party to prepare the party's cross-examination; and
>
> (ii) the notes and other materials to be released comprise information solely about the party who is seeking their release; and
>
> (iii) there are exceptional circumstances; and
>
> (c) if the court permits disclosure under paragraph (a) or (b), the disclosure is subject to any terms and conditions that the court considers appropriate.

[16] Paragraph 2 of Mr Morahan's r 429 request dated 23 November 2017 reads as follows:

> To this end he [the respondent] wishes to instruct Ms Kate Burke as an expert. The purpose of this consultation is to provide tactical advice as to what sensible orders can be made and if conclusion is reached there is a possible resolution to provide expert evidence to appear before the Court as his expert witness in this regard.

[17] If that was a request for a second opinion, which it could be interpreted to be, then s 133(10) permits the Court to order a second opinion "only if there are exceptional circumstances". As far as I can see, there are no exceptional circumstances in this particular case to warrant or to justify a second opinion. In fact, Mr Morahan made no submissions on s 133(10).

[18] Section 133(14) provides that if approval for a second opinion is not given a Court can permit disclosure of the materials to a psychologist who is employed by a party, but such material as is disclosed may only be used to assist the party to prepare cross-examination (s 133(15)).

[19] Mr Morahan's request in his letter of 23 November 2017 goes well beyond assistance as to cross-examination.

[20] I find that there are no grounds under s 133 to permit disclosure of the materials (which includes the two reports) to Kate Burke.

[21] There being no grounds for the disclosure of the reports, by receiving them and reading them, Kate Burke has put herself in the position of not being able to give any evidence in these proceedings. Accordingly, I rule the affidavit of Kate Burke to be inadmissible and it is to be removed from the file.

[22] I turn briefly to the notice to produce documents, which was the second issue Judge McHardy directed be dealt with at this interlocutory hearing. Rule 153 Family Court Rules 2002 is the relevant provision. I set that out below.

153 Notice to produce documents

(1) A party may serve a notice on another party requiring the other party to produce a document or thing—

(a) for the purpose of evidence at any hearing in the proceedings; or

(b) before a Judge, officer, examiner, or other person authorised to take evidence in the proceedings.

(2) If the document or thing is in the possession, custody, or power of a party to whom a notice to produce is served, the party must, unless the court orders otherwise, produce the document or thing in accordance with the notice.

(3) A notice to produce—

(a) must be treated as an order of the court to produce the document or thing referred to in the notice; and

(b) does not need to be accompanied by a summons of production.

[23] It is clear from that provision that a notice to produce documents is an order of the Court and r 153(2) requires the respondent to produce the documents sought "unless the court orders otherwise".

[24] I agree with Ms Crawshaw's submission that if there is an objection to produce the documents sought, then an application must be made, in this case by the respondent, to the Court. No such application has been made. I have no information before me to indicate which of the documents sought are not agreed to be produced or the reasons for objecting. Because there is no time for such an interlocutory application to now be dealt with, that issue will have to be addressed at the commencement of the hearing.

[25] I wish to make some ancillary directions. The first is that Mr Cooke is to prepare the bundle of documents. I would be obliged if he could ensure the court has the bundle no later than 14 November 2019. The second is that Mr Morahan is to ensure that all communication from him to the Court and to other counsel is to be copied to the applicant by email. Finally, it is essential that Mrs Crawshaw's appointment as counsel to assist the court continues in order that an independent

perspective of the issues be provided to the court especially in light of the applicant's previous refusals to attend the Court for hearings and conferences.

L J Ryan
Family Court Judge

Signed 24 October 2019 at pm