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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2013-070-001527
[2021] NZFC 5169

IN THE MATTER OF	FAMILY COURT ACT 1980
BETWEEN	[DOUGLAS BARRON] Applicant
AND	[MOLLY CLEVELAND] Respondent

Hearing: 2 June 2021

Appearances: J Wynyard for the Applicant
D Eades for the Respondent
Z Wackenier as Counsel for Intervenor - SAFE
T Bartlett as Lawyer for the Children

Judgment: 4 June 2021

RESERVED REASONS JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO RELEASE OF SAFE REPORT – S 69 EVIDENCE ACT 2006 AND S 12A FAMILY COURT ACT 1980]

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[1] Following an interlocutory submissions only hearing on 2 June I made an order directing that the SAFE Network Early Intervention Service Assessment Outcome Summary in relation to [Johnny Alexander] dated 9 October 2020 be released to counsel for Mr [Barron] and Ms [Cleveland] with counsel able to show but not copy that assessment summary to the parties. This judgment sets out the reasons for reaching that decision.

Background

[2] Mr [Barron] and Ms [Cleveland] are parents of two children, [Lacey] and [Erica], aged 10 and 9 respectively. Ms [Cleveland] has an elder child from a previous relationship, [Johnny Alexander].

[3] The care arrangements for [Lacey] and [Erica] were the subject of a Parenting Order made in the Tauranga Family Court on 30 July 2014. However, on 15 May 2020 Mr [Barron] applied without notice for an order discharging that Parenting Order and seeking to make a new Parenting Order on the basis of an allegation that [Johnny] had engaged in sexually abusive behaviours with another child and therefore [Lacey] and [Erica] were potentially at risk of sexual abuse by [Johnny] when they were in Ms [Cleveland]'s care. The existing Parenting Order was suspended following a without notice application by Mr [Barron] in May 2020; [Lacey] and [Erica] are now again in the care of Ms [Cleveland], but [Johnny] has moved to live elsewhere with whanau. A hearing has been set down for 10 June next to determine whether there are any ongoing risk issues for [Lacey] and [Erica] in relation to [Johnny], and as a consequence of those findings what the future care and contact arrangements are to be for both girls, and more particularly, whether [Johnny] can return to live with them and Ms [Cleveland].

[4] Ms [Cleveland] as [Johnny]'s mother was aware that he had undertaken an assessment by SAFE and sought to produce evidence from SAFE in relation to that assessment at the hearing in support of her position that [Johnny] should now be allowed to return home. While [Johnny]'s therapist, Ms [Rush], was initially willing to swear an affidavit, she subsequently received advice from SAFE management that

she was not to do so, and accordingly Mr Eades sought and obtained on behalf of Ms [Cleveland] a Witness Summons for Ms [Rush] to appear at the hearing.

[5] SAFE have subsequently instructed Tompkins Wake, Solicitors of Auckland, who appear on behalf of Ms [Rush] as an Interested Person[1]. SAFE in effect sought a determination that confidential communication and/or information in relation to [Johnny] is not disclosed pursuant to s 69 of the Evidence Act 2006 in the COCA proceedings concerning [Lacey] and [Erica]. Those applications are supported by Mr [Barron] but opposed by Ms [Cleveland]. The issues I needed to determine therefore are:

(a) Whether the Assessment Outcome Summary (AOS) report in relation to [Johnny] is to be excluded pursuant to s 69 of the Evidence Act 2006 (EA).

(b) If the answer to that question is yes, whether the evidence is otherwise admissible under s 12A of the Family Court Act 1980 (FCA).

Analysis

[6] Pursuant to s 12A(2) and (4) of the FCA the provisions of the EA govern the admissibility of evidence in the Family Court. In effect Ms [Rush] is seeking, pursuant to s 12A of the FCA, the application of s 69 of the EA in the COCA proceedings concerning [Lacey] and [Erica]. Section 69 of the EA states as follows:

> **69 Overriding discretion as to confidential information**
>
> (1) A **direction under this section** is a direction that any 1 or more of the following not be disclosed in a proceeding:
>
> (a) a confidential communication:
>
> (b) any confidential information:
>
> (c) any information that would or might reveal a confidential source of information.
>
> (2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the

[1] Pursuant to s 52(1)(c) Evidence Act 2006.

communication or information is outweighed by the public interest in—

(a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or

(b) preventing harm to—

(i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or

(ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or

(c) maintaining activities that contribute to or rely on the free flow of information.

(3) When considering whether to give a direction under this section, the Judge must have regard to—

(a) the likely extent of harm that may result from the disclosure of the communication or information; and

(b) the nature of the communication or information and its likely importance in the proceeding; and

(c) the nature of the proceeding; and

(d) the availability or possible availability of other means of obtaining evidence of the communication or information; and

(e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and

(f) the sensitivity of the evidence, having regard to—

(i) the time that has elapsed since the communication was made or the information was compiled or prepared; and

(ii) the extent to which the information has already been disclosed to other persons; and

(g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.

(4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.

(5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or

> would, except for a limitation or restriction imposed by this subpart, be privileged.

[7] I accept the submission of Ms Wackenier that Ms [Rush] as an employee of SAFE is an interested person pursuant to s 52(1)(c) of the EA. In considering s 69, it is Ms Wackenier's submission that the public interest in the disclosure of the AOS is outweighed by the public interest in:

(a) Preventing harm to [Johnny], his family, the SAFE network and any other persons mentioned in the report (including the victim of [Johnny]'s sexual behaviours).[2]

(b) Preventing harm to the relationship of confidence between SAFE and [Johnny] in the course of which the confidential information of SAFE's communication has been obtained.[3]

(c) Maintaining the activity of assessments between the SAFE network and its clients that rely on the free flow of information.[4]

[8] Central to the submissions of Ms Wackenier is a concern that the therapeutic relationship between [Johnny] and Ms [Rush] would be jeopardised by the release of the report to Mr [Barron] and Ms [Cleveland]. The Court of Appeal in *R v X* held that the test of whether information is confidential information is an objective test.[5] Furthermore information will be confidential if the party claiming confidentiality could have a reasonable expectation of confidentiality.[6] The assessment outcome summary commences with the statement:

> This outcome summary is confidential and restricted to the intended recipients, named in the accompanying letter or email. The purpose of this assessment is limited to the provision of information and clinical interpretation informing hospital future therapeutic intervention …

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2 Section 69(2)(a).
3 Section 69(2)(b)(i).
4 Section 69(2)(c).
5 *R v X* [2009] NZCA 531.
6 *Greenbaum v Southern Cross Hospitals Ltd* [2019] NZCA 438.

[9] In this case it is clear that the information in the AOS must be "confidential information" under the EA, and that [Johnny] and his mother would have had a reasonable expectation of confidentiality.

[10] Section 69(2) of the EA provides that the decision whether or not to protect confidentiality is to be determined by a consideration of competing public interests. Essentially, the question will be whether the public interest in confidentiality is outweighed by the general public interest in the disclosure of relevant material. The Court of Appeal in *Mental Health Addiction & Intellectual Disability Service v Hussain* stressed the highly confidential nature of mental health medical records, noting that confidentiality is not just concerned with the harm that a disclosure may do to the individual patient whose privacy interests are at stake, but also with the harm done to the confidential relationship itself, stating at [66] that:[7]

> Both those matters emphasise the wider public interest in non-disclosure here.

[11] However, in considering the issue of public interest pursuant to s 69(2) it is important to recognise the forum in which the issues are being litigated. That is, these are proceedings in the Family Court under COCA, the publication of which, and the restrictions upon the public being able to attend, are governed by ss 11A to 11D of the FCA. That this is a relevant factor was highlighted by his Honour Judge de Jong in *[Mercer] v [McDaniel]*[8] and I adopt his Honour's reasoning.

[12] Furthermore, it is also important to recognise that pursuant to s 4 of the Care of Children Act[9] and article 3.1 of the United Nations Convention on the Rights of the Child (of which New Zealand is a signatory) the best interests of the child are to be the primary consideration "in all actions concerning children", including in a Court of law. In considering the issues around disclosure of the AOS, I therefore need to consider the welfare and best interests of [Lacey] and [Erica] as one of the factors to be taken into account. While Ms Wackenier in her submissions has highlighted the necessity of also considering the welfare and best interests of [Johnny], in this case the Court's primary concern must be the welfare and best interests of [Lacey] and

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7 *Mental Health Addiction & Intellectual Disability Service v Hussain* [2020] NZCA 81.
8 *[Mercer] v [McDaniel]* [2021] NZFC 3403 at [26].
9 Section 4(1)(a) COCA.

[Erica]. It must be in their welfare and best interests to have all relevant and admissible evidence before the Court, particularly to assist the Court in forming its assessment as to the girls' safety in terms of the Court's mandatory consideration of the need to ensure that they are safe that they are protected from harm/violence.[10] Nevertheless, whilst there is a greater need to consider the welfare and best interests of [Lacey] and [Erica], s 69 does require consideration of the prevention of harm to [Johnny] and the protection of [Johnny]'s therapeutic relationship with SAFE, and I cannot ignore his [Johnny]'s welfare and best interests.

[13] Additionally, pursuant to s 69(3) there are a number of mandatory considerations that I must have regard to. The first is to consider the likely extent of any harm to [Johnny] that may result from the disclosure of the AOS.[11] [Johnny] has been equivocal as to whether he consents to the report being released or not. He particularly is concerned about Mr [Barron] having access to the report and seeing the extent of the allegations against [Johnny]. I accept that disclosure of the assessment outcome summary will be distressing to [Johnny], and to that extent may cause him harm.

[14] The next consideration is the nature of the information contained in that report and whether it is likely to be of significance in the proceedings concerning [Lacey] and [Erica].[12] In Ms Wackenier's submission SAFE is of the view that the evidence is irrelevant and should be given little weight by the presiding Judge. With the greatest of respect to Ms Wackenier, a decision as to weight and relevance is for me as the hearing Judge to make and not SAFE. The matters set out in the AOS are clearly essential for the Court in considering the risks (if any) to [Lacey] and [Erica] arising out of [Johnny]'s sexualised behaviour with another (not related to these proceedings) young girl.

[15] An assessment therefore of the risks that [Johnny] does or does not pose to [Lacey] and [Erica] is essential to the ultimate outcome, as is a report as to the disclosures that [Johnny] has made around the circumstances of his sexualised

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[10] Section 5 COCA.
[11] Section 69(3)(a).
[12] Section 69(3)(b).

behaviour and the other factors impacting on his offending choices at that time. It is also useful, as I suggested to Ms Wackenier for there to be some guidance from SAFE, an internationally and nationally recognized specialist organisation in the therapeutic treatment of adults and children involved in inappropriate sexualised behaviour, as to what steps can be taken (if any) to mitigate the future possibility of risks to [Lacey] and [Erica]. What weight is to be given to the AOS is an issue that can only be determined by me after hearing the totality of the evidence.

[16] In terms of the nature of the proceeding,[13] the sole issue for consideration is what relationship these children should have with Ms [Cleveland] and in particular whether they can reside in the same household as their half-brother [Johnny] or not.

[17] There is no other means of obtaining the evidence that is set out by SAFE in the AOS as no one else has met with [Johnny] and undertaken any assessment.[14] The restrictions on public disclosure[15] have been addressed by me at [11] above and is inherent in the very nature of these proceedings. The direction I made was that the report could be provided to counsel but not copied to the clients, and thus counsel who have ethical and professional obligations to the Court, must ensure that the report is not more widely disseminated. As Mr Eades sets out in his thorough and very helpful submissions, the Court is able to impose such restrictions; the Court of Appeal in *R v X* at [84] held that:

> … there does not appear to be anything in s 69 which restricts the court in requiring disclosure from giving firm directions as to just how that information is actually to be disclosed in court. … In short, it seems to us that the trial Judge has a present ability to limit the amount of public damage that might be done.

[18] Finally, in terms of s 69(3)(f) I accept there has been an eight-month delay from the completion of the AOS and the hearing next week. However, as submitted by Mr Eades, an eight month delay is not unusual in the context of Family Court cases. Additionally, the information has already been disclosed to Ms [Cleveland] who has had some discussions with Ms [Rush], and therefore there is no prejudice to either parent in now receiving that information. More fundamentally, the information in

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[13] Section 69(3)(c).
[14] Section 69(3)(d).
[15] Section 69(3)(e).

relation to the extent of the admissions by [Johnny] are entirely relevant to the present considerations, and it cannot be seriously argued that they have become irrelevant simply because they were made eight months ago.

[19] Thus whilst I acknowledge [Johnny]'s concerns about the release of the AOS, the public interest consideration weighs in favour of disclosure on the basis that any information in that AOS is directly relevant and indeed necessary to the Court's consideration about the primary issues which are before it in relation to ongoing care and contact arrangements for [Lacey] and [Erica]. In short, without the evidence of Ms [Rush], there is an acceptance that [Johnny] has engaged in some form of sexualised activity, but no other evidence as to the extent of what that sexualised activity involved, what level of risk (if any) [Johnny] presents in the future, and what steps can be taken to mitigate the risk.

[20] I do not accept that there is a risk to the therapeutic relationship between [Johnny] and Ms [Rush]. In an adult context SAFE is well used to its reports being utilised, for example, in Parole Board hearings where at times, as part of release conditions, there is an ongoing therapeutic relationship to an adult offender and SAFE. A situation such as that faced by SAFE in relation to [Johnny] is not, therefore, unchartered waters for SAFE; rather it is simply reflective of a paradigm that forms the basis of much of their practice in the justice arena.

[21] It was for those reasons that I determined that the AOS could be released. When I made that determination Ms Wackenier helpfully advised Ms [Rush] would now answer her witness summons and appear and be available for cross-examination. I am grateful for that indication. For it has become apparent that if a Witness Summons is not answered by Ms [Rush] the only remedy under COCA is a referral for prosecution; there is no ability, unlike Witness Summons issued pursuant to the Family Violence Act, to issue a warrant for Ms [Rush]'s arrest.

Section 12A of the Family Court Act 1980

[22] However, for the sake of completeness, even if I am wrong in the relation to the admissibility of the AOS under s 69 EA, then I still would have admitted the evidence under s 12A of the FCA. Section 12A(4) provides:

> (4) The effect of section 5(3) of the Evidence Act 2006 is that that Act applies to the proceeding. However, the court hearing the proceeding may receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding.

[23] The effect of s 5(3) of the EA is that the EA applies to proceedings under the Care of Children Act. However, the Court hearing a proceeding may receive any evidence, whether or not admissible under the EA, that the Court considers may assist it to determine the proceeding.

[24] The test therefore if evidence is inadmissible under the EA, is that of assistance to the Court in determining a proceeding. However, in making that assessment the Court must still consider whether the evidence that is sought to be admitted is admissible under ss 7 and 8 of the EA. That is, there must be evidence that is relevant in terms of s 7, and its probative value must not be outweighed by the risk that evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong a proceeding.[16] Thus evidence which is inadmissible under s 69 of the EA may nevertheless still be admissible under s 12A(4) provided it is relevant and is not going to have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding.

[25] For the reasons set out above the matters set out in the AOS are directly relevant to the issues before the Court and will not be unfairly prejudicial or prolong the proceedings. This is particularly so, given the obligations to have as the Court's first and paramount consideration the welfare and best interests of children and to ensure the protection of children from all forms of harm and from family violence.[17] Thus confidential information which may be inadmissible in criminal or civil context,

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[16] Section 8 EA.

[17] Section 5(a) Care of Children Act 2004.

may be able to be admitted in the Family Court context provided that that evidence is relevant and necessary information to assist the Court in ensuring that children's safety concerns are met so that a decision is made in their welfare and best interests.

[26] Similar considerations would apply to care and protection proceedings under the Oranga Tamariki Act 1989 pursuant to s 12A of the FCA. However, s 12A(4) does not apply, of course, to the youth justice provisions of the Oranga Tamariki Act, and thus the determination of alleged confidential evidence would be fall for consideration solely under s 69 of the EA. Given the similar restrictive nature of the publication of proceedings in the Youth Court, it may be similar considerations as to that above are as equally applicable.

[27] It was for a combination of these reasons that I made the order authorising the release of the Assessment Outcome Summary to counsel.

S J Coyle
Family Court Judge