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

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IN THE FAMILY COURT
AT NORTH SHORE

I TE KŌTI WHĀNAU
KI ŌKAHUKURA

FAM-2021-044-000015
[2021] NZFC 5499

IN THE MATTER OF	CARE OF CHILDREN ACT 2004
BETWEEN	[LALO SAPANI] Applicant
AND	[MELISSA CROFT] Respondent

Hearing:	4 June 2021
Appearances:	J Moore for the Applicant C Tataru for the Respondent A Bell as Lawyer for the Children
Judgment:	4 June 2021

ORAL JUDGMENT OF JUDGE D M PARTRIDGE

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[1] Ms [Croft] and Mr [Sapani] are the parents of [Fiona] aged 10 and [Victoria] aged seven. Both parents are present in court. Ms Moore represents Mr [Sapani], Ms Tataru represents Ms [Croft], and Ms Bell is lawyer for the children.

[2] This matter comes before the Court today for a one-hour submissions only hearing on the discreet issue of whether or not an interim parenting order, which was

obtained by Mr [Sapani] on a without notice basis on 15 January 2021, should be discharged.

[3] I am grateful to counsel who have filed submissions and spoken to them and answered the questions of the Court.

Background

[4] By way of background; the parties were in a relationship from approximately 2008 and separated in [2018]. From that time, they had the shared care of their children, essentially on a 2-2-5-5 basis until COVID-19 hit. The arrangements then became less distinct and there was some dispute about what the care arrangements were for the children.

[5] In and around September the arrangements changed because Mr [Sapani] had trained to become [employment deleted] and was on a four-day rotational roster. There was agreement that he would have the children in his care during his days off, at least from the time they finished school until later in the evening and then they would return to their mother's care.

[6] On 12 October 2020, that arrangement changed and instead the children remained in Mr [Sapani]'s care for the entirety of his leave time. There is a dispute about how that arrangement actually occurred. Ms [Croft]'s position was that this was an arrangement imposed on her by Mr [Sapani], she was very unhappy about that, but she acknowledged that she did not take any specific legal steps such as filing an application in the court, although she took advice and did some investigations about what her options were.

[7] Around that time, or just before, Ms [Croft] had decided that she wanted to relocate to [location A]. Initially, Mr [Sapani] agreed to that in principle and then subsequently, on reflection, decided he did not want to agree to that. He did not believe that that would be in the welfare and best interests of the children.

[8] Ms [Croft] had, on the basis of her concern about the altered care arrangements, sought mediation. That was also an opportunity for the parties to discuss relocation. The parties attended mediation on 2 December 2020. There was no agreement reached.

[9] The mediator did record the basis of an agreement, but was very clear when sending it to the parties, by stating that "This agreement is not admissible as evidence before the Court yet as the document does not have all the parties' signatures on it."

[10] Following that, there was communication between the parties and the mediator, with the mediator attempting to assist the parties to resolve matters outstanding for them to be able to reach agreement.

[11] There was also communication sent by Ms Moore to Ms Tataru which was not received by her, on 16 December.

[12] On 23 December 2020 Mr [Sapani] emailed the mediator and said: "Unfortunately we move to the next step with legal representation."

[13] The following day, on 24 December 2020, the mediator forwarded the outcome of the family dispute resolution which recorded that ***the parties had not reached agreement***. (Emphasis added)

Proceedings

[14] On 15 January 2021, Mr [Sapani] filed without notice applications for an interim parenting order and an order that the children remain living in the [location B] area. The last application was as a result of his concern that Ms [Croft] would relocate, unilaterally, to [location A].

[15] The applications came before his Honour Judge Callinicos. He made an interim parenting order and an order that the children were to reside in [location B] until that order was replaced by another interim order or a final order.

[16] When making the interim order his Honour gave the following reasons:

> The application establishes the high threshold set for without notice orders (see *Martin v Ryan* and Family Court Rule 220) in that;[1]
>
> (T)here is a clear case on the merits. Although the applicant accepts that he had initially agreed to the children relocating to [location A], it is clear that ***both parties agreed to a subsequent altered arrangement at the FDR on 2 December 2020***. That new and substitute arrangement was that the parties would continue the previous 4 day rotation of care between them pending resolution of the relocation issue. I note from the letter of the respondent's lawyer dated 16 December 2020 that no reference seems to be made to the ***FDR agreement***. I am uncertain whether such lawyers had not been advised of that agreement or chose to ignore ***such a pivotal event***. In determining this application, I have had regard to the principles in *F v M* that in determining interim arrangements, the court should clearly identify the status quo and should maintain that arrangement unless there is cogent evidence that such maintenance would distinctly put the welfare of the children at risk. Although there will be inconvenience to the respondent and children, ***I am not satisfied that the situation is such where I should ignore the agreements that the parties themselves reached at FDR***.
>
> (Emphasis added)

[17] His Honour then gives further reasons that:

> (T)he requisite form of harm or risk in r 220 would arise if the application proceeded on notice, namely a risk that the children will be relocated unilaterally notwithstanding that the respondent mother has agreed to postpone a move pending resolution of the guardianship dispute,
>
> (T)here has been no material delay in applying
>
> (T)he order made would have been provisional only until any defence filed is determined.
>
> (T)he rights of the respondent to be heard, have been displaced by the risk of harm/hardship that might arise if the application were on notice.

[18] When considering the application on a without notice basis, Judge Callinicos was clearly of the view that the parties had reached agreement at FDR.

[19] In his affidavit Mr [Sapani], at paragraph 8, states:

> The respondent and I attended mediation to finalise a care arrangement. The respondent and I reached an agreement on 2nd December 2020 as to the care arrangements for the children. The agreement was not signed. I annexed annexure A, the mediated agreement dated 2nd December 2020.

[20] In annexure A of the affidavit there is a circle around the statement: "The following interim parenting agreements and understandings were reached; the

[1] *Martin v Ryan* [1990] 2 NZLR 209, (1990) 6 FRNZ 187 (HC).

following care arrangements are agreed to until the issue of whether the children will be relocating is resolved." The circle is clearly intended to draw the Judge's attention to that sentence.

[21] It is abundantly clear from the evidence available that there was no such agreement.

[22] I am further satisfied that Mr [Sapani], at the time that he filed his without notice application, could not for a second have understood that there was agreement.

[23] The correspondence from Ms [Croft]'s counsel makes it clear that there is no agreement. That is dated 16 December 2020. The correspondence that Mr [Sapani] himself had with the mediator during December, which culminated on 23 December with him saying that the matter would need to move to legal representation, makes it clear that he was aware that there were issues that had not been agreed.

[24] I do not accept that the issues that were moving to legal representation related specifically to relocation because this was an agreement which he purports to have been in place pending resolution of that issue.

[25] Finally, on 24 December, having been told by the mediator and receiving that confirmation in the formal notification of the outcome to the family disputes resolution form, Mr [Sapani] was abundantly clear that there was no agreement.

[26] Yet, two or so weeks later he files an affidavit clearly stating that there was an agreement. That, in my view, was absolutely and unforgivably misleading.

[27] There is no question in my mind that the Judge relied specifically on that. He refers to it in no less than four parts of his reasons for his decision, as follows:

(a) He says: "It is clear that both parties agreed to a subsequent altered arrangement at the FDR on 2 December 2020."

(b) He refers to it being "a new and substitute arrangement".

(c) He refers to that agreement being "a pivotal event"; and

(d) Finally he states: "I am not satisfied that this situation is such where I should ignore the agreements that the parties themselves reached at the FDR."

[28] This is not a situation where Mr [Sapani] had sought that the Court endorses a status quo arrangement where there was perhaps for him a perceived risk that Ms [Croft] was going to remove the children from that arrangement or from [location B].

[29] I must say, however, although Ms [Croft] was dissatisfied with the arrangement, as was stated in her affidavit evidence, this arrangement was nevertheless imposed on her by Mr [Sapani] on 12 October. On her evidence, it was not something that she agreed to, but she did not take matters in her own hands but made other enquiries about what could be done, which led to the mediation occurring.

[30] Against that backdrop, I struggle to see why Mr [Sapani] would have felt that there was any threat whatsoever that Ms [Croft] would disrupt the care arrangements that had been in place for that period of time.

[31] Once Ms [Croft] had been served with the orders that had been made, on 25 January 2021 she filed a notice of defence to the interim guardianship order and an application to discharge the interim parenting order. The time was abridged to five days for Mr [Sapani] to file a response and he was also required to include an explanation about why the draft agreement at FDR was presented as an agreement reached at mediation.

[32] The matter came before Judge Maude on 15 February 2021. Lawyer for child was appointed at that stage and his Honour directed an urgent hearing if required, on submissions only, in respect of an application to relocate to [location A] if that was sought. Ms [Croft] filed that application at the end of March 2021.

[33] This hearing was allocated simply to determine whether the interim parenting order should be discharged. The application for relocation is to be transferred to the long cause fixtures' list after this hearing.

Legal Framework

[34] Counsel have appropriately referred me to r 220 Family Court Rules 2002 (FCR) which provides the provision for applications under the Care of Children Act 2004 to be made on a without notice basis if the delay that would be caused by the application proceeding on notice would or might entail serious injury, undue hardship, risk or risk to the personal safety of the applicant or any child of the applicant's family or both.

[35] Given what has transpired, I have significant reservations whether that threshold would have been met if the evidence filed accurately reflected the situation.

[36] Rule 34(c) FCR provides that each person against whom the without notice orders are made, may at any time, make an interlocutory application to a judge to have the order varied or rescinded. It is under that provision that this matter comes before the Court today.

[37] The principles to be applied are helpfully set out by Judge de Jong in *Zola v Abel*,[2] as distilled from relevant case law:

> (a) The proper course to follow when challenging a without notice order is to apply to the Judge who made that order or, if necessary, to another Judge.
>
> (b) The application must be considered in the context of the relevant legislation.
>
> (c) The requirements of natural justice, and the principles identified in s 27(1) New Zealand Bill of Rights Act 1990, *Martin v Ryan*[3] and *CRA v Family Court at Blenheim*[4], mean that no orders should be made against an affected party until the party has an opportunity to be heard unless there are special circumstances that fall within legislative exceptions. The legislative exceptions for the purposes of the Act are those identified in FCR 24(2), 220(2) and 335(3).
>
> (d) There is a positive duty on the person who obtained the without notice order to fully and frankly disclose all relevant circumstances, whether helpful to that person or anyone else, and not to mislead the Court.

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[2] *Zola v Abel* [2016] NZFLR 81.
[3] *Martin v Ryan* n 1.
[4] *CRA v Family Court at Blenheim* [2015] NZHC 1604, [2015] NZFLR 731.

(e) The application for the without notice order should have been made promptly and not be the result of the applicant's "self-induced emergency" – *Martin v Ryan.*

(f) The effect of the orders should only be brief and provisional in the context of allowing the status quo to prevail until the matter can be dealt with input from both parties – *Martin v Ryan*.

[38] I have also been referred to r 416(h)(a) FCR which provides that the certificate of the lawyer accompanying the without notice application must include certain statements including that the lawyer has advised the applicant that every affidavit filed with the application must fully and frankly disclose all relevant circumstances whether or not they are advantageous to the applicant or any other person. It also requires the lawyer to certify that they have made reasonable enquiries of the applicant in order to establish whether all relevant circumstances have been disclosed, and that, to the best of the lawyer's knowledge, every affidavit filed discloses those relevant circumstances.

[39] Finally, the lawyer signs to confirm their satisfaction that the application and affidavit complies with the requirements of the Act and its rules and that that lawyer themselves are satisfied, on reasonable grounds, that the order or orders sought fall within the grounds on which an order can be made.

[40] It is fundamental to a without notice application that all evidence filed is accurate and correct. The threshold is higher than that imposed on an on-notice application because the respondent's rights of natural justice are, of necessity, thwarted. The Court sees just one side of the case and has to be satisfied to a high threshold that an order should be made and that, if not made, there is serious risk of hardship or safety.

[41] In *Martin v Ryan* Fisher J noted:

> It should not be overlooked that an order made ex parte represents a fundamental denial of that natural justice upon which a whole system of civil litigation rests… That discretion is to be favourably exercised only with reluctance and caution in cases where a denial of conventional natural justice is unavoidable.

[42] I have, in submissions, been referred to a number of cases, that include cases that provide guidance to the Court about the steps that should be taken when considering whether or not orders should be discharged when sought on an interlocutory basis.

[43] Ms Moore has referred me *Parker v Parker*[5] which cited the principles set out by Judge de Jong in *Zola v Abel*.[6] I have also been referred to *Ronin v Rigby*[7] and to *W v W,* a decision of 30 May 2001 where Judge Ingles stated:

> What is required is full disclosure that is absolutely honest; the facts exactly as they are without any gloss or spin, without any strategic omissions or distortions or hidden advocacy, plain unvarnished and honest statements are verifiable and relevant to fact. This is a high standard that is required and should be applied because of the inherent procedural unfairness in applying without notice.[8]

[44] I have also been referred to the decision of *Stanford and Smalls* where at paragraph 13 Judge Moss states:[9]

> … It cannot have been intended that a person ruled against on a without notice application is without remedy to render equivalent that person's access to the Court. I consider that this is a matter not provided for in the rules and thus Rule 15 applies. I consider that applying the practise in Rule 34 renders the procedure on a without notice applications consistent among the Family Law acts. This complies with the Rule 13. Applying Rule 34 by use of Rule 15 is a consistent practice, as envisaged by Rule 13.

[45] At paragraph 14 she goes on to say:

> I am satisfied therefore that the Rule 34 process is a consistent practice and can be entertained by the Court. Further, in my view it is necessary that such a practice should be entertained by the Court where an application is made without notice and where a party disadvantaged contends that the Court has acted on evidence which was incomplete or materially misleading.

[46] I have also been referred to the case of *Gurnani v Gurnani*.[10]

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[5] *Parker v Parker* [2017] NZFC 1959.
[6] *Zola v Abel* n 2.
[7] *Ronin v Rigby* [2019] NZFC 5075.
[8] *W v W* Family Court New Plymouth SP04300101.
[9] *Stanford and Smalls* [2016] NZFC 3993.
[10] *Gurnani v Gurnani* [2017] NZFC 9986.

Decision

[47] Having considered the evidence filed and the submissions of counsel, the legislative requirements and lead guidelines set out by the case law and having regard, as I always must, to sections 4, 5 and 6 of the Care of Children Act when deciding matters under that Act despite this being a mechanical provision, I am satisfied that Mr [Sapani] has failed in his positive duty to fully and frankly disclose to the Court in an open, full and honest way what the situation was in respect of the mediation outcome. In particular, that agreement had not been reached in that forum.

[48] As a consequence of his failure to set out in his without notice affidavit that there was no agreement reached but rather to inform the Judge dealing with the matter that there was an agreement, meant that the Court was not fully informed of all of the relevant circumstances pertaining to the case.

[49] I am satisfied that the Court then was placed in the situation of acting on evidence that was incomplete and was materially misleading. The resulting decision disadvantaged Ms [Croft], breaching her rights to natural justice by not allowing her an opportunity to be heard before a decision was made.

[50] On that basis, the interim parenting order made on 15 January 2021 is discharged.

Progression

[51] I have made it clear to the parties that the status quo care arrangement, which is essentially what was recorded by way of the interim parenting order, will now continue as the children's care arrangements. I understand from Ms Bell that, from her perspective and from her clients' perspective, there needs to be some discussion around some of the details of that.

[52] Ms Bell had previously made herself available to convene a roundtable meeting for the parents to be able to discuss those issues in the children's welfare and best interests. That offer has not been taken up yet, it seems because there was a

requirement that the issue of relocation would not need to be before the Court for that to occur.

[53] I urge the parties to give further thought to that position. This is clearly a situation where the children will benefit from having arrangements in place that are clearly defined so that there is no room for any misunderstanding which may well lead to conflict between the parties, and which clearly would not be in the children's best interests.

[54] In closing, I want to make this observation. It may well have been that Mr [Sapani] was feeling vulnerable, without the security of an order, that the children may have been taken by their mother down to [location A].

[55] If that was the case, then there needed to be further formal discussions between the lawyers because both parties were represented by counsel. Even if his concerns were not able to be quelled by communication then he might have been able to persuade a judge to make an order preventing the children relocating from [location B] until that matter had been either agreed or determined by a court.

[56] That would have been understandable in the circumstances, but there is no reason why he felt he needed to take those steps. If he had just taken a step back he would have realised that Ms [Croft] is not someone to act unilaterally, despite feeling aggrieved with the care arrangement which she sincerely believed did not meet their daughters' welfare and best interests.

Directions

[57] I now make directions that this file is to be transferred into the Auckland Court for a long cause fixture to be allocated.

[58] There is agreement that the issues to be determined are Ms [Croft]'s application to relocate with the children to [location A] and, from there, the care arrangements for the children, whether or not they remain in [location B] or live in [location A].

[59] The witnesses required are the parties only.

[60] There is no agreement at this stage about how long is required, but between one and two days is estimated. I note that Judge Druce had previously recorded that a one-day hearing would be required. However, on reflection, that might be insufficient time, or the timeframe might be too tight. Counsel will give some further thought to the time period that they believe will be required to determine both matters.

Costs

[61] Costs are sought in respect of this application.

[62] Any cost submissions and memoranda are to be filed within 14 days on behalf of Ms [Croft], by 18 June 2021. Submissions on behalf of Mr [Sapani] 14 days thereafter, by 2 July. Ms [Croft] may have a right of reply by 9 July.

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Judge DM Partridge
Family Court Judge

Date of authentication: 21/06/2021
In an electronic form, authenticated electronically.