

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 WHANGAREI**

**I TE KŌTI WHĀNAU
KI WHANGĀREI-TERENGA-PARĀOA**

**FAM-2018-088-000452
[2021] NZFC 3403**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[AVA MERCER] Applicant
AND	[JESSE McDANIEL] Respondent

Hearing: 15 April 2021

Appearances: M Russell for the Applicant
C Muston for the Respondent
D Whitehead as Lawyer for the Children
S Manning for the Chief Executive of Oranga Tamariki—Ministry for Children

Judgment: 15 April 2021

**ORAL JUDGMENT OF JUDGE L de JONG
[FCR: discovery]**

Introduction

[1] This Care of Children Act (“COCA”) file is about [Kara] born on [date deleted] 2010 and [Alyssa] born [date deleted] 2011.

[2] A hearing has been directed today to determine two discovery applications filed by the children's mother against Oranga Tamariki and the police. The applications are supported by the girls' father but opposed by Oranga Tamariki.

What is the relevant background?

[3] After the girls' parents separated, their father (Mr [McDaniel]) entered a relationship with Ms [Church]. Ms [Church] has a son called [Joseph] born on [date deleted] 2012.

[4] Reports of concern were made to Oranga Tamariki in 2017 and 2018 about [Kara] and [Alyssa] exhibiting inappropriate sexualised behaviour. Those reports of concern included reference to [Joseph].

[5] In July 2018 [Joseph] disclosed to a social worker that Mr [McDaniel] and the girls had touched him in a sexually inappropriate way. Later that month [Joseph] was the subject of an evidential interview but his disclosures did not implicate [Kara].

[6] The girls were interviewed by a social worker but did not make any disclosures and were therefore not referred for an evidential interview.

[7] In August 2018 Ms [Church] reported to a social worker that [Joseph] had withdrawn his allegations but he did not want to live with Mr [McDaniel] and the girls.

[8] Due to the nature of the allegations, the fact that a police investigation was underway, and in light of the reported retraction, [Joseph] was referred by Oranga Tamariki to forensic psychologists in their Specialist Services Unit. [Joseph] was interviewed by Mr Taylor and Ms Besson in September 2018 and [Joseph] made disclosures about the girls but not Mr [McDaniel]. The psychologists were concerned about whether [Joseph] was coached by his mother to retract his allegations and formed the view that [Joseph]'s original disclosures about the girls and Mr [McDaniel] were likely to be reliable.

[9] Ms [Mercer]'s applications for r 143 orders are dated 5 and 23 November. In general terms Ms [Mercer] seeks copies of all professional interviews with [Joseph]

and information about who interviewed all three children. In particular, she wanted police copies of [Joseph]'s evidential interview and transcripts, as well as copies of any statements and an update about where their investigation was up to. In the case of Oranga Tamariki, Ms [Mercer] sought the psychologists' records of interview and data associated with [Joseph], as well as all records associated with the three children's social worker interviews.

[10] The complicating feature of these proceedings is that [Joseph] is not a child who is the subject of the COCA proceedings currently before the Court. [Kara] and [Alyssa] are. [Joseph]'s parents are not parties to the proceedings but [Joseph]'s mother has filed an affidavit. Oranga Tamariki is not a party to the proceedings but is an interested party because the Chief Executive filed a s 131A social work report dated 14 September 2018, a s 132 social work report dated 12 December 2018 and, on 26 January this year, Judge King directed a further s 132 report. Oranga Tamariki is also an interested party because their social workers and psychologists have investigated and collected the data that is materially relevant to the care, contact and welfare of [Kara] and [Alyssa]. Privacy issues arise for [Joseph] and his parents, and their lack of status in these proceedings.

[11] Counsel for Ms [Mercer] has filed submissions dated 12 April.

[12] The police and Oranga Tamariki were served at the end of last year. There is no appearance by or on behalf of the police today. It is not entirely clear why this is. To be fair to the police, there may have been some confusion because the Evidence Regulations minute makes reference to [Kara] and [Alyssa] but not to [Joseph]. There should have been no confusion about the r 143 application because that makes reference to [Joseph].

Can an order for discovery be made?

[13] At the heart of the case for Ms [Mercer] is that the s 132 social work report dated 18 December 2018 refers to the serious issues I have mentioned. Ms [Mercer] is frustrated that Oranga Tamariki have not provided any information to her to help her understand the evidential basis reached by the psychologist to form an opinion

relating to the retraction of [Joseph]'s allegations and the veracity of his allegations. It is submitted on behalf of Ms [Mercer] that the information is highly relevant and necessary to determine safety issues. Ms [Mercer] is understandably concerned for and about her children. She is a lay person and not in a position to understand, without all the relevant information. The Court is also placed in an invidious position because the opinions are relevant for the purpose of s 5(a) when making a safety assessment.

[14] It seems today there is at least some agreement that the parents are entitled to any and all information that relates solely to [Kara] and [Alyssa], in particular the interviews the girls have been the subject of.

[15] Counsel for the father has filed brief submissions. He effectively supports the submissions made by and on behalf of Ms [Mercer] and the girls.

[16] Counsel for the Chief Executive has filed submissions dated 9 April. The position taken by the Ministry is that they confirm records are held in the form of child focussed interviews in respect of [Joseph] but oppose this information being released. It is observed that two of three social workers involved in the case have since left the Ministry and I am advised from the bar that Ms Besson is no longer employed as a psychologist with the Specialist Services Unit. Mr Taylor is still retained in that position.

[17] Of particular concern to the Chief Executive is the need to maintain the privacy of disclosures. It is submitted at paragraph 25 that "children must be able to make disclosures without fear of their disclosures being made public."

[18] Of course, when children are interviewed, they are not guaranteed privacy. The whole point of making disclosures and collecting them is to ensure that children are safe and to act on those disclosures if they are not. There is no question that [Joseph] has a right to privacy and that he is a vulnerable person, if only when considered in the light of the meaning of a vulnerable person in terms of s 11D of the Family Court Act 1980.

[19] When considering evidence, it is important to assess whether the evidence is relevant¹ to the proceeding. If evidence is relevant, it will be admissible unless it is inadmissible or excluded.²

[20] “Opinion” evidence is a “statement of opinion that tends to prove or disprove a fact.”³ Opinion evidence will therefore be relevant⁴ if it has probative value. However, the probative value of opinion evidence will be “outweighed by the risk”⁵ the evidence will “have an unfairly prejudicial effect on the proceeding”⁶ or “needlessly prolong the proceeding.”⁷ In this context there is an “opinion rule”⁸ that a statement of opinion is not admissible except as provided in ss 24 & 25 Evidence Act 2006 (“EA”).

[21] The whole purpose of expert opinion evidence is to provide the Court with relevant “scientific information which is likely to be outside the experience and knowledge”⁹ of the Judge. It is also important¹⁰ the expert is neutral, objective, impartial and willing to abide by the High Court Code of Conduct for Expert Witnesses.

[22] Ms [Mercer] is entitled to investigate whether the psychologist’s opinion is relevant. Whether she is entitled to access to the psychological notes is another matter. This requires an examination of the non-party discovery provision under r 143 and whether the psychological notes and record are confidential because of s 69 EA.

[23] There can be little doubt that the psychological notes and records are relevant data in their assessment of whether [Joseph] has been coached or as to the veracity of his allegations. The allegations are relevant to the safety of [Kara] and [Alyssa] with their father. To this extent the psychological notes and records are relevant and discoverable unless privileged or confidential. Whether the notes are declared

¹ Section 5, 7 and 8 EA.

² Section 7(1) EA.

³ Definition of “opinion” – s 4 EA.

⁴ Section 7 EA.

⁵ Section 8(1) Evidence Act 2006.

⁶ Section 8(1)(a) Evidence Act 2006.

⁷ Section 8(1)(a) Evidence Act 2006.

⁸ Definition of “opinion rule” – ss 4 & 23 Evidence Act 2006.

⁹ *R v Turner* [1975] QB 834.

¹⁰ *R v Griffin* [2001] 3 NZLR 577.

privileged or confidential involves the exercise of the Court's discretion in terms of ss 53–69 EA.

[24] The notes are not privileged in terms of the Act. I find it is more likely than not that any reasonable person would hold the reasonable belief that the discussions between the psychologist and [Joseph] in a professional context, and associated clinical notes, would be treated as confidential.¹¹

[25] Whether and to what extent Ms [Mercer] may access the psychological notes and records involves an exercise of the Court's discretion in terms of ss 69(2), (3) & (4). It is effectively a balancing exercise¹² and the Court may impose conditions on the disclosure of confidential information for the purpose of r 143.¹³

[26] I find the public interest weighs in favour of disclosure on conditions for reasons that include the psychological notes and records are relevant to the main issue in this case about the safety of [Kara] and [Alyssa] in the context of allegations made solely by [Joseph]. I also take into account that [Joseph]'s mother is a deponent in the proceedings and disclosure is the only reasonable means Ms [Mercer]'s professionals have to analyse the data relied on by the psychologists to form their opinions. While the proceedings in the Family Court will be conducted in private, [Joseph] will likely be afforded further protection from publication under the confidential provisions of the Family Court Act as a vulnerable person for the purposes of s 11D. Despite this I exercise my discretion to limit the disclosure of psychological notes and records.

[27] After discussion with counsel, what I intend to do is to appoint senior counsel to assist the Court. It is important experienced counsel to assist the Court is appointed. I propose Mr Harte or Ms Kennedy are appointed for this purpose. One of the matters that has not been addressed prior to this hearing is input from [Joseph]'s parents. They are entitled to express a view. I intend to appoint counsel to assist for the purpose of discussing with Mr and Mrs [Church] the nature of the r 143 applications and the implications. It is important Mr and Mrs [Church] have input as to how the

¹¹ *R v X* [2009] NZCA 531 at [61].

¹² *Ibid.*, at [72] & [74].

¹³ See *Vector Gas Contracts Ltd v Contact Energy Ltd* [2014] NZHC 670 at [32].

information is distributed and whether it is. At this stage I intend to make orders that only allow the lawyers involved in this case, and the Court, to view the material. They will not be permitted to disclose or discuss the contents of the material with their respective clients until further order of the Court.

[28] I plan to have the file referred back to me. I am mindful there is a settlement conference on 7 May. It may be unrealistic to expect that all matters can be attended to before then but efforts will be made nonetheless.

[29] Counsel to assist the Court will also be tasked with ascertaining whether the police intend to prosecute Mr [McDaniel] in relation to allegations made by [Joseph Church] and, if not, when their file was closed. I understand Mr [McDaniel] has been interviewed by the police, probably in 2018 but possibly in 2019.

[30] Counsel to assist will also be asked to arrange for the EVI video and transcript in relation to [Joseph] to be released to the Court and held by the registrar until further order of the Court.

[31] Once the information from the police is available, the views of Mr and Mrs [Church] known, and the Oranga Tamariki information held by the registrar, I intend to review the file for the purpose of considering whether the information can be accessed by the girls' parents. Hopefully by then counsel for the parties will have had the opportunity to consider the material and make submissions on a private basis. I say on a private basis because if any information is disclosed in the submissions, it will be important the parties do not view that information until they are permitted by the Court.

[32] Before finishing, I should make a note about the case in the matter of *in the matter of C* which is an unreported decision of the Family Court in 2004 and attached to Mr Muston's memorandum. In my view that decision can be distinguished from the present situation because of the nature of the evidence and the fact our case relates to a child who is not involved in the proceedings.

ORDERS & DIRECTIONS

[33] I make the following orders and directions:

(1) Rule 143 orders are made requiring the Chief Executive of Oranga Tamariki to disclose to the Court:

(a) any notes or records of Mr Taylor and Ms Besson, or any other SSU psychologist, in relation to an interview with [Joseph Church] born [date deleted] 2012, with particular reference to opinions that [Joseph] may have been coached to retract his allegations and that “[Joseph] had told the truth about Mr [McDaniel] in his interview”.

(b) all child focussed interview records, notes and transcripts for interviews of [Alyssa] and [Kara] on 17 July 2018.

(c) all child focussed interview records, notes and transcripts for interviews of [Joseph Church] on 18 July 2018.

(2) Discovery in relation to [33](1)(b) may be released to Ms [Mercer] and Mr [McDaniel].

(3) Discovery in relation to [33](1)(a) & (c) may be released to counsel only as set out in this minute.

(b) Counsel to assist the Court is appointed to investigate and report on:

(i) the views of Mr and Mrs [Church] to release information about [Joseph] in paragraph [33](1)(a) & (c) of these orders.

(ii) Ascertain whether the police hold an EVI and transcript in relation to [Joseph Church] and whether their file is closed.

- (iii) arrange for Judge King's minute dated 19 October 2020 to be executed to the extent that the EVI video and transcript are held by the registrar.
- (c) Refer the file to me upon receipt of memorandum of counsel to assist the Court.
- (d) The registrar is directed to forward a copy of this judgment to Oranga Tamariki to the attention of Ms Manning.

Judge L deJong
Family Court Judge

Date of authentication: 21/04/2021
In an electronic form, authenticated electronically.