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

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IN THE FAMILY COURT
AT MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM-2014-092-000519
[2021] NZFC 5170

IN THE MATTER OF	Care of Children Act 2004
BETWEEN	[DENISE CARNEY] Applicant
AND	[GLENN CARNEY] Respondent

Hearing:	03 June 2021
Appearances:	Ms Dhanji for Ms [Carney] Mr [Carney] representing himself.
Judgment:	14 June 2021

RESERVED DECISION OF JUDGE M L ROGERS

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[1] [Denise Carney] and [Glenn Carney] are the parents of [Arlene] and [Lois]. Unfortunately, Mr and Mrs [Carney] have been engaged in court proceedings relating to their children since 2014.

[2] Final parenting orders were made on 9 October 2018. Ordinarily, that would mean that the parties could not return to court for two years pursuant to s 139A.

[3] However, in April 2020, the world was dealing with the COVID pandemic. Ms [Carney] applied to the court for leave under s 139A and for a variation of the final parenting order. On 6 April 2020, Judge Southwick Q C granted "leave to apply for an interim parenting order is granted on an interim basis". Judge Southwick noted that the situation with the pandemic had led to totally unforeseeable events which represented a significant change, which in turn led to a requirement for interim variation of the 2018 order.

[4] The court then made an interim variation order providing that until further order of the court, each party would reside at an address in Auckland for the purposes of taking care of the children and would not take the children outside of Auckland without the written consent of the other party.

[5] On the 17 April 2020, Judge Tan considered another without notice application, this time filed by Mr [Carney], to discharge the variation order as the country was no longer subject to Level 4 pandemic restrictions. Judge Tan declined that application on a without notice basis.

[6] Mr [Carney] lodged a further application on 21 May 2020 and was granted leave under s 139A by Judge Ryan, who observed

> "This is a repeat of the application dealt with by the court on 17 April 2020. The applicant should have sought leave to bring this application, however it is not in the children's best interests and welfare to require an application for leave to be filed. Leave should be granted because there is a material change in circumstances: namely, the move to Alert Level 2."

[7] The matter then came before me on 30 June 2020, and I recorded a minute noting that while the parties had generally agreed to return to the parenting arrangements prior to the variation in early April 2020, issues arose as to whether the s 139A leave granted for the variation extended to an application to vary the final orders, and whether there should be additional conditions imposed in those final orders. I directed the matter be set down for hearing,

[8] On 21 August 2020, Judge Wagner recorded (by consent) that "the interim variation order dated 6 April 2020 is discharged, all applications filed this year [2020] are withdrawn, the hearing on 25 August 2020 is vacated."

[9] On 21 December 2020, Ms [Carney] filed a further application under s 56(1)(a) on the basis that "the parenting order we agreed on is comprehensive but unfortunately does not provide details around holidays, when both parents are not in Auckland." That application was filed on a without notice basis. No application was lodged pursuant to s 139A.

[10] Judge Binns, in considering the without notice application, commented with respect to the existing order:

> "that suggests there is no need for the parenting order to be varied. The parties of course have the ability to agree, via the Talking Parents app, halfway at the [location deleted]. In the absence of agreement, the parenting order will prevail. It was clearly not intended that in holiday time, the parties would travel back to Auckland to receive the children. The Court is dealing with many urgent applications this afternoon and the parties need to understand that they must focus on the welfare and best interests of their children, and not the battle between them."

[11] Mr [Carney] has not filed a defence in compliance with the Family Court rules, but he has filed an affidavit dated 22 January 2021, which makes it clear that he opposes the without notice application. He characterises that application as one of many attempts made by Ms [Carney] "to cause difficulty and thwart contact between myself and the children". Mr [Carney] also said that the application required leave under s 139A.

[12] Matters came before Judge Ginnen on 5 March 2021, and I note Judge Ginnen's minute of that date. Judge Ginnen summarised the issues for today's hearing as follows in paragraph 7:

> "A question arises about when there has been a final direction or order made within the last two years. The final parenting order was made over two years ago. If that is the final order for the purposes of s 539A (1) (B) then leave is not required. However, on 21 August 2020, Judge Wagner, the applications that had been filed earlier that year (sic). If that is a final direction for the purposes of s 139A then leave is required. A one-hour submissions only hearing was allocated to determine that issue, and that is the matter that came between me on 3 June 2021."

The Law

[13] The restriction on access to the Family Court provided by s 139A was introduced for the first time with the Care of Children Amendment Act (2) 2013. The intention of this new restriction was explained in *Pidgeman v Oliver* [1] at [14]:

"… to prevent continual and repeated litigation for issues affecting a child or children. The intention was that once a parenting order is made by the Court, which first satisfies itself the care arrangements are in the welfare and best interests of the child, there should be a two year period following in which the parties need to get on and make the care arrangements work. Continual litigation diverts parents' attentions and resources from properly parenting their child. As a child grows older his or her needs will evolve and change, and parenting arrangements need to be reviewed. Parliament considered two years is an appropriate minimum time for such reviews to occur."

[14] It is practical for the purposes of this decision to set out the section in full;

> **139A Leave required in certain cases to commence substantially similar proceedings**
>
> (1) A proceeding (a new proceeding) may not be commenced under section 46R, 48, or 56 without the leave of the court if that new proceeding—
>
> (a) is substantially similar to a proceeding previously filed in [[the Family Court]] by any person (a previous proceeding); and
>
> (b) is to be commenced less than 2 years after the final direction or order was given in the previous proceeding.
>
> (2) The leave of the court may only be given under subsection (1) if, since the final direction or order was given in the previous proceeding, there has been a material change in the circumstances of—
>
> (a) any party to the previous proceeding:
>
> (b) any child who was the subject of the previous proceeding.
>
> (3) In this section, a new proceeding is substantially similar to a previous proceeding if—
>
> (a) the party commencing the new proceeding was a party to the previous proceeding; and
>
> (b) a child who is the subject of the new proceeding was the subject of the previous proceeding; and

[1] *Pidgeman v Oliver* [2015] NZFC 6585.

(c) the new proceeding—

(i) is commenced under the same provision of this Act as the previous proceeding; or

(ii) is for an order varying the order made in the previous proceeding; or

(iii) is for an order discharging the order made in the previous proceeding.

(4) This section does not apply if every party to the new proceeding consents to its commencement.]

[15] The application filed by Ms [Carney] in December 2020 is a new proceeding under s 56. In my assessment, the application is also substantially similar to the earlier proceedings relating to the parenting arrangements (139A)(1)(a)). The crucial question in terms of sub-section 1 is whether or not the application is brought less than two years after the final direction or order was given in the previous proceedings.

[16] The position for Ms [Carney] and her counsel is that the relevant previous proceedings are the proceedings which were concluded by the making of a final parenting order on 9 October 2018. If that is correct, then leave is not required under s 139A.

[17] Mr [Carney]'s position is that the previous proceeding for the purposes of s 139A were those filed in 2020 to vary the parenting order and that it is Judge Wagner's directions of 21 August 2020 which are the final directions in a previous proceeding. If that is correct, then leave is required under s 139A and Mr [Carney] says leave should be declined because the new proceeding is so substantially similar to the previous proceedings.

Is leave required under s 139A?

[18] As an aside, I note that to date, it does not appear Ms [Carney] has ever filed a specific s 139A leave application in respect of her December 2020 proceedings. It is therefore open to me to dispose of the matter by simply determining that such an application is required and directing that it be filed. However, having regards to the paramount consideration in s 4 of the Care of Children Act 2004 (the welfare and best interests of the children), requiring strict compliance in this respect seems to me to

unnecessarily delay these proceedings. Both Mr and Mrs [Carney] are clear that if leave is required, then Mrs [Carney] is seeking leave.

[19] In considering what status to accord the applications before the Court in 2020 and whether or not those amounted to "proceedings" as contemplated by s 139A, I take as my starting point s 5 of the Interpretation Act 1999, which says that the meaning of an enactment must be ascertained from its text and in light of its purpose.

[20] I note that when Ms [Carney] applied to vary the parenting order in April 2020, leave under s 139A was sought and was granted. That is a tacit acknowledgement by the applicant that those were indeed new proceedings which required s 139A leave. Once the leave had been granted, the new proceedings continued until 21 August 2020, when the final round of orders in that proceeding was made, being an order discharging the interim variation order dated 6 April 2020. That is borne out by the simple fact that the last sealed order on the file is the discharge order of 21 August 2020.

[21] Ms Dhanji sought to persuade me, by reference to Rule 416W of the Family Court Rules, that it was not clear if a final order could or had been made by consent at the judicial conference. I note that Rule 416W confirms that at a directions conference, the presiding judge may do any of the relevant things listed in Rule 175D(2).

[22] Rule 175D confirms that **without limiting the generality of sub-clause 1,** the judge may do any of a listed series of steps. That includes under 175D(2)(j) with the consent of the parties, make an order for settlement relating to the application that has the same effect as if it were an order made under Rule 179. Rule 179 allows the judge to make a consent order at settlement conferences.

[23] In my view, the discharge order which Judge Wagner made on 21 August 2020 was an order for settlement made with the consent of the parties. The minute records that the discharge order is made by consent, both parties were present at the conference and neither party subsequently raised any issues with the propriety of the discharge order.

[24] Bearing in mind the guidance to look to the wording and intent of the legislation, I am satisfied that the proceedings in 2020 did constitute a previous proceeding and that the final order in that previous proceeding was only made on 21 August 2020. That means that s 139A (1)(a) and (b) are met, so that leave is required.

Should leave be granted?

[25] Leave may only be given if, since the final order was made in the previous proceeding, there has been a material change in the circumstances of any party to the previous proceeding, or any child who was subject of the previous proceeding.

[26] Ms [Carney]'s application of 21 December 2020 does not identify any material change of circumstances but does advise that the parties have been unable to reach agreement about changeover arrangements during the holiday period. The parenting order records for the Christmas holidays 2018: "the parties shall agree on the changeover venue via the Talking Parents application". Ms [Carney] proposes that the order be varied to read "if both parents are holidaying outside of Auckland and within a reasonable distance, travel for pick-ups and drop-offs should be equally shared. i.e., one party does the drop-off and one-party travels to do the pick-up".

[27] It is readily apparent from the voluminous litigation, and indeed from the records available through the Talking Parents app, that these parents continue to have extreme difficulties in dealing with each other in a civil and constructive manner. But that is far from a new development. The Court has neither the jurisdiction nor the resources to provide the sort of in-depth family therapy that might improve that reality.

[28] I remind myself that in all matters, including s 139A applications, the paramount concern for the Court is the children's welfare and best interests. Accordingly, I must ask myself if the resumption of court proceedings, which will require the Court to again elicit the children's views thus engaging them in the process, will be in the children's welfare and best interests? Arguably the children would benefit from resolution of the dispute over pick up and drop off arrangements during holidays but the greatest benefits to resolving this issue would seem to be for the adults.

[29] Is it in the children's welfare and best interests to allow their parents to return to the Court because the adults cannot agree about holiday pick up and drop off? As I have noted, this is not a new issue. The Court was mindful of these parents' struggle to communicate and endorsed the use of the Talking Parents app for resolution of such issues. In my assessment that was a recognition that the communication problems were likely to be ongoing, and that has proven to be the case.

[30] On balance, I have come to the view that the two-year moratorium on repeat proceedings should be enforced in this case. I do not consider it is in the children's welfare and best interests to allow their parents to have recourse to the Court every time they are unable to agree on a parenting issue. This is a relatively minor matter and I do not think its resolution merits the further involvement of the children in what will, despite the minor nature of the issue, likely be lengthy proceedings. That would only send them negative messages about their parents which would be inconsistent with the expectations of the s 5 principles.

[31] Leave pursuant to as 139A to commence new proceedings is declined.

[32] File is to be closed.

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Judge M Rogers
Family Court Judge

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