

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

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**IN THE FAMILY COURT
AT PORIRUA**

**I TE KŌTI WHĀNAU
KI PORIRUA**

**FAM-2019-085-000452
[2021] NZFC 9943**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[ERIC GENOVESE] Applicant
AND	[ASHLYNN COLLINS] Respondent

Hearing: 4 October 2021

Appearances: G Roche for the Applicant
R Hey for the Respondent

Judgment: 4 October 2021

ORAL JUDGMENT OF JUDGE J A BINNS

[1] This is an oral decision. I reserve the right to edit it in chambers and add any additional reasons as I see fit.

[2] The parties to these proceedings are Mr [Genovese] and Ms [Collins]. They have a daughter aged approximately three and a half called [Zaria]. Her date of birth is [date deleted] 2018, she will be five in 2023.

[3] A final parenting order was made by consent on 23 October last year. It provided for the parties to share the care of [Zaria]. Essentially, it is a three day-four day alternating regime so that in one week Mr [Genovese] has the care of [Zaria] for three nights, and in the following week for four nights.

[4] Although the order is not expressed particularly clearly, the parties know how it works. The changeovers occur at 9 am on a Saturday or a Sunday and then the changeovers occur at what is referred to as [deleted]. So, Mr [Genovese] picks up [Zaria] the day before his care starts.

[5] As part of the order there was a provision that [Zaria]'s place of residence would be Wellington and that she is not to be relocated from Wellington on a permanent basis without the other parent's consent.

[6] In considering Mr [Genovese]'s application filed on 10 June this year, Mr [Genovese] is seeking leave to vary the parenting order which was made last year.

[7] I also note that the parties were re-referred to s 46G counselling by Judge Doyle on 11 August 2021. I can find no record that re-referral has been made. I bring that to the case officer's attention as it is clearly important that it is made. I ask that it is followed up with the Family Court Co-ordinator.

[8] In terms of the application for leave, Mr [Genovese] claims that there has been a material change in circumstances for Ms [Collins] since the order was made. He is now seeking to have day-to-day care of [Zaria] and for Ms [Collins] to have contact with [Zaria] based at her parent's home. His concerns centre around Ms [Collins] losing her housing multiple times; he says due to her inability to afford rent and her worsening mental health.

[9] Mr [Genovese] says that Ms [Collins] has relocated six times in the six months prior to the filing of his application and that when he did apply, she was "couch surfing" in [location deleted].

[10] There is no evidence from Ms [Collins]' mother but she is referred to in the evidence as expressing a concern to Mr [Genovese] about Ms [Collins]' mental health.

[11] Ms [Collins]' position is that at the time the orders were made she was in a rental property in [suburb deleted]. She says it was a sleepout on her landlord's property. His mother became sick and she had to leave. She was residing for a time in [a different suburb] and subsequently, in mid-April 2021, she moved to [name deleted]'s home.

[12] In submissions today her lawyer accepts that Ms [Collins] has moved five times since the order was made.

[13] The key issues in relation to the application for leave are:

- (a) The instability of the living situation for Ms [Collins] and thus [Zaria];
and
- (b) Mr [Genovese]'s concern about Ms [Collins]' deterioration in her mental health.

[14] I note the parties are currently awaiting a judicial settlement conference relating to the issue of their daughter's schooling.

[15] There is also a context to this application which relates to an application which was made by Ms [Collins] who applied without notice in effect to suspend [Zaria]'s care with her father. That application was founded on concerns that [Zaria] may have been sexually abused. In reading the application, there is an inference that the likely perpetrator was her father. Subsequently, however, that application was discontinued at the request of Ms [Collins] which was not opposed by Mr [Genovese]. That occurred before Judge Doyle on 11 August and it was Her Honour who directed this hearing to consider the issue of leave to Mr [Genovese] to apply to vary the parenting order.

[16] Lawyer for Child has filed submissions. It would be fair to say that her submissions are somewhat neutral. In conclusion, Lawyer for Child, who sought to

have her attendance excused today, left the decision up to the Court. Ms Hughes noted in her written submissions the background that essentially this is a factual determination. Ms Hughes noted that if the Court is satisfied that there has been a material change in circumstance which allows Mr [Genovese]'s application to continue, that essentially leave is granted and the application adjourned so that issues could be discussed at the judicial settlement conference.

[17] Section 139A of the Care of Children Act 2004 provides that leave is required in certain cases. Under s 139A(1) a proceeding, in this case a new proceeding, so Mr [Genovese]'s application to vary the parenting order may not be commenced 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. It is referred to as a previous proceeding; and
- (b) is to be commenced less than two years after the final direction or order was given in the previous proceeding.

[18] Under s 139A(2) the leave of the Court may only be given if, since the final 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.

[19] 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, which is the case here.
- (b) The child who is the subject of the new proceeding was the subject of the previous proceeding, which is the case here; and

- (c) the new proceeding is for an order varying the order made in the previous proceeding.

[20] This section does not apply if there is consent. It is clear there is no consent hence the need for this hearing.

[21] In this case Lawyer for Child, as I have said, is somewhat neutral. She certainly did not actively advocate for leave being granted. She simply left it to the Court. The originating evidence includes hearsay. I am told today that Ms [Collins] has signed a new lease for one year. That is not provided. I think in general terms it is accepted that that is the case, although it appears that Mr [Genovese] is somewhat sceptical because he is indicating that, that has not necessarily changed the position in the past.

[22] The key issue from my point of view is a focus on the welfare and best interests of [Zaria]. There are many aspects to this because she is young. She does not need her parents to be continually arguing with each other. The change in living environment is not necessarily a material change in circumstances. It could qualify as a material change if the change puts the child at risk due to the fact the welfare and best interests of [Zaria] are paramount.

[23] The number of changes is a concern, notwithstanding the housing crisis in Wellington, because there is no doubt that [Zaria] needs stability and a sense of security and safety.

[24] There is no clear third party evidence to establish risk to [Zaria] as a result of concerns due to her mother's mental health. So, the critical issue is the impact of the changes in residence insofar as lack of stability. There is no detailed evidence of risk to [Zaria] due to her mother's living situation in the evidence that was filed by [Zaria]'s father. He says, amongst other things, firstly: "[Ashlynn]'s mother, [Liz Collins], told me that [Ashlynn]'s flatmate, [Leah]'s dad, is a drug dealer and her partner is in prison for drug related offences."

[25] Firstly, that is hearsay evidence. Secondly, that is not where [Zaria] is living now with her mother. It potentially raises an issue about [Zaria]'s mother's judgment

in terms of who she associates with, but it seems that issues about [Zaria]’s mother were known in previous proceedings and would have been known to [Zaria]’s dad at the time the parties reached their agreement regarding the current care arrangements for [Zaria]. [Zaria]’s father says:

I’m very concerned about what [Zaria] is exposed to in that home. I do not know if [Ashlynn] has her own room or if [Zaria] has her own bed while she's there. I have raised the concerns with [Ashlynn] but she has not been willing to discuss this with me.

[26] It is quite clear in these proceedings that the parties do not communicate well and that there is a lot of mistrust. The allegation that was made following concerns for [Zaria] about possible sexual abuse would not have helped and I do not think has helped. I am told there has been a referral made to Oranga Tamariki and, clearly, if there are concerns that arise from that referral, then those issues can be dealt with, and if there is clear evidence of concern, then I have no doubt that leave would be granted. But there is insufficient evidence before me today regarding the allegations of sexual abuse and in fairness Mr [Genovese]’s application was not founded on that, although it is clear that he had some peripheral concerns.

[27] He said in his evidence: “I have noticed that [Zaria] is increasingly unsettled with every new move that [Ashlynn] makes. She has also told me that she is scared of ‘Mummy’s friends’”. He gave an example at the end of April when [Ashlynn] lost her most recent accommodation and she moved into her friend’s house. He said: “[Zaria] told me she was scared of someone called ‘[nickname deleted]’,” and at first he thought this was a toy or maybe a pet. She said he then heard from [Liz], that is his daughter’s maternal grandmother, that [nickname deleted] is actually a friend of [Ashlynn]’s. He says that when he brought this up with [Ashlynn], she said she was allowed to associate with whoever she liked and that he could not control her life.

[28] In the legal submissions filed, counsel note that there has been much debate as to what material means in terms of assessing a material change in circumstances. In *Border v Tokoroa*, Judge de Jong confirmed his acceptance that material means important, essential or relevant, and in this context is likely to be interpreted as

important or relevant to any assessment of the welfare and best interests of the child and their particular situation.¹

[29] In the decision in *Roundtree v Tipsanich*, Judge Maude noted:²

To qualify as a material change, the change proposed must be one that, if placed before the Judge who had heard the proceedings earlier, would have been one that would have likely led the Judge to reach a different conclusion.

[30] On behalf of Ms [Collins], her lawyer submits that there has not been a material change in Ms [Collins]'s circumstances. One of the key reasons is that the basis of the claim that Ms [Collins] has lost her house multiple times essentially has been responded to and has now been addressed by Ms [Collins] finding permanent accommodation.

[31] I have to say that I am concerned that at the heart of this is an interpersonal battle between the parents as opposed to [Zaria]'s welfare and best interests, and I also need to observe that some instability in accommodation would not necessarily lead to the proposal which Mr [Genovese] is seeking to achieve, namely that contact is restricted and supervised at the mother's parents' home.

[32] I have decided to grant leave. I need to make it clear that that is not an indication in any way at all that the orders that the parties agreed to are not appropriate to meet [Zaria]'s needs. They have been in place for a reasonably significant period in terms of [Zaria]'s age.

[33] The key reason I have decided to grant leave is, firstly, that there have been more than one or two changes in accommodation; there have been five. I think it is important to get some information about [Zaria]'s mother's current circumstances. I have essentially been told from the bar that she has rented a property for 12 months. There is no information about that property and there is no information about who comes and goes from that property. I think given the history of concern about the possibility, and I put it no higher than that, that there was some inappropriate sexual behaviour towards [Zaria], that it is important that these issues are looked at. As I say

¹ *Border v Tokoroa* [2014] NZFC 10947

² *Roundtree v Tipsanich* [2016] NZFLR 99

that does not mean, Mr [Genovese], that that will lead to a substantial change because there are many, many good reasons that you both had for reaching the agreement that you did.

[34] What I am going to do is, firstly, grant leave to apply to vary the order.

[35] Lawyer for Child is not here today but I would like her to consider, in consultation with counsel, whether there needs to be a social worker's report so that both parents can get some clarity around the involvement of Oranga Tamariki in relation to the referral that was made by [Zaria]'s GP, and so there is good information about the mother's accommodation.

[36] In the meantime, the proceedings are adjourned for case review so that counsel can confer and file a memorandum addressing issues for a social worker's report.

[37] The proceedings are adjourned to Monday 11 October for that purpose, but they will be discussed at the settlement conference alongside the issues to be discussed regarding [Zaria]'s schooling. I remind the case officer to please follow up the referral for s 46G counselling because, above all, the parties need to improve their communication and trust and that, unfortunately, is sadly lacking at that moment.

Judge J A Binns
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 06/10/2021