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 PALMERSTON NORTH

I TE KŌTI WHĀNAU
KI TE PAPAIOEA

FAM-2019-054-000043
[2022] NZFC 5482

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[DONNA WADE] Applicant
AND	[BRIAN WADE] Respondent

Counsel: C LaHatte for the Applicant
T Whelan for the Respondent
R Lohrey as Lawyer for the Children

Judgment: 15 June 2022
(On the papers)

DECISION OF JUDGE J F MOSS
[As to the referral for arbitration]

---

[1] In this long running matter, the children [Colby] and [Milton] have come to be settled in a regime for care in their father's care, after three years of ceaseless and difficult litigation.

[2] When a parenting order was submitted in two options proposed by counsel to be sealed as a final order in August 2021, the parents agreed to the provision at sub para X of the general conditions. This reads:

> The parties agree that any guardianship issues not covered by these orders will be resolved between the parties via OFW. If agreement cannot be reached via OFW then, the parties agree to take the matter to a family law arbitrator on the basis they shall be bound by the arbitrator's decision. The costs of arbitration shall met by the party who is unsuccessful.

[3] In the succeeding months, the mother has sought to invoke the arbitration provision, and has become confounded by the reasonable demands of the Family Dispute Resolutions Centre, which suggests that the order does not provide an appropriate procedure nor authority for the appointment of an arbitrator. The mother sought refinement of order as a correction, by application of the slip rule.[1]

[4] Although counsel for the applicant has written extensive submissions apparently establishing the basis for the exercise of the Court's jurisdiction, counsel has not proposed a form of order which would create a binding obligation which is capable of being employed under the Arbitration Act 1996.

[5] I emphasise that this drafting in the final parenting order was of counsel's making. It did not fulfil the purpose which I had indicated to be desirable, during the course of hearing. Despite this, it appeared to be a mechanism which was close enough to the goal of keeping this family out of Court, and I approved the drafting.

[6] In the light of matters which the mother now seeks to refer to arbitration, I have a clear and firm view that the agreed detail relating to arbitration has been imperfectly considered. I am advised that the matters which the mother seeks to arbitrate are:

a. Medical appointments are not being shared early enough or at all;

b. Consultation on issues like medication for ADHD has been inadequate;

c. School activities and after school activities are either not shared or are notified too late;

---

[1] Family Court Rules 2002, r 204.

d. There was inadequate consultation on enrolment at [school name deleted] and the associated School requirements;

e. Ms [Wade] has either not been advised of parent teacher meetings or has been given inadequate notice to enable her to attend; and

f. Mr [Wade] has not offered Ms [Wade] the opportunity to care for the boys when they have needed to be cared by others.

[7] I accept the submission of counsel for Mr [Wade] that all of these matters have been resolved in the form of the parenting order.

[8] More than that, having considered the Arbitration Act, and in particular s 10(1), that this arbitration agreement, which appears in a court order, but which was agreed, is contrary to public policy. The risk that entrenched conflict will motivate the mother to continue to attempt arbitration holds with it the risk that the children's exposure to the stresses involved with ongoing conflict will continue.

[9] In any exercise of power under the Care of Children Act, the person or agency exercising power must do so with the welfare and best interests of the children as the first and paramount consideration. Regrettably, it does not appear to me that the mother has understood her responsibility in that role when she invoked the arbitration clause.

[10] It is, in my view, contrary to public policy, for the children to be drawn into another round of conflict, which must surely follow the mother's invoking of the clause. Although the Arbitration Act allows the Care of Children Act to prevail, the fact of the invoking of this clause deprives the children of the protection of the moratorium on substantially similar litigation for two years.[2] Because of the adverse impact of court proceedings, losing the protection for the children of the application of s 139A is adverse to their best interests. It was foreseeable that this clause could be used in ways which are consistent with the exercise of the welfare and best interests principle, and, therefore, from time to time arbitration may not be contrary to public policy. However, in the hands of these parties, I consider that sub para X is contrary to public policy. By application of s 10 of the Arbitration Act 1996, I consider that

[2] Arbitration Act 1996, s 9 and Care of Children Act 2004, s 139A.

this dispute is not capable of determination by arbitration. To that extent, the terms of the order offends public policy. The order is amended by omitting the words:

> If agreement cannot be reached via OFW then the parties agree to take the matter to a family law arbitrator, on the basis they shall be bound by the arbitrator's decision. The costs or arbitration shall be met by the party who is unsuccessful.

[11] The remaining segment of sub para X places upon the parents the onus to resolve agreements using OFW. There remains the Court's jurisdiction under s 46R of the Care of Children Act to enable an application to resolve a guardianship dispute which relates to a matter which is novel and is therefore not caught by s 139A. In the event that either parent seeks to invoke that jurisdiction, any application will need to be accompanied by proof, not only that the matter in hand is a guardianship matter, but also that there have been real, sustained, and child-focused exchanges via the OFW platform in order to demonstrate the inability to reach agreement.

[12] Counsel for the respondent has indicated that the matter of costs will be sought. That is proper. Full solicitor-client costs are to be awarded. This claim by counsel for the mother was without merit, whether as to resolution of the arbitration provision or as to the substance of matters which she sought to submit to arbitration. The quantum of costs will be fixed once counsel for the father files the necessary memorandum.

[13] Finally, the final parenting order of 23 August 2021 is now discharged. A further order is to be sealed with the one amendment referred to in this judgment.

_____
Judge JF Moss
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 15/06/2022