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 MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM-2019-057-000054
[2020] NZFC 3465

IN THE MATTER OF	The Care of Children Act 2004
BETWEEN	[LYLE ROTH] Applicant
AND	[CLEO ROTH] Respondent

Hearing: In chambers

Judgment: 22 May 2020

JUDGMENT OF JUDGE S D OTENE
[Costs]

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[1] Mr [Roth] seeks costs on his application[1] to exclude as inadmissible evidence contained in Mrs [Roth]'s affidavit sworn 18 September 2019 in support of her application made without notice for a parenting order to secure contact with the parties' son, [Oscar]. The material objected to consisted of reproduced excerpts from a social worker's report to the court.[2]

[1] Pursuant to r 170 of the Family Court Rules 2002 (FCR).
[2] Provided on the court's direction pursuant to section 132, Care of Children Act 2004.

[2] On 4 March 2020 at the hearing to determine the application Mrs [Roth], with the court's leave, withdrew the affidavit in question and filed a new affidavit omitting the material to which Mr [Roth] objected.

[3] I summarise Mr [Roth]'s position as follows:

(a) His application was successful because the manner in which the objection was resolved was in accordance with the resolution he originally proposed.

(b) By Ms [Roth] persisting with her opposition until the hearing he has unnecessarily incurred costs in bringing and prosecuting the objection.

[4] Mrs [Roth]'s response, in summary, is that she had a reasonable argument against Mr [Roth]'s application, that Mr [Roth] was not prejudiced by the evidence hence did not need to pursue the application and that because the application was not judicially determined Mr [Roth] was not successful.

[5] Costs are a matter of discretion. Exercise of that discretion can admit application of the civil proceedings cost rules[3] but observant of the paramountcy of child welfare and best interests.[4]

[6] Mr [Roth]'s submits to the effect that considerations of child welfare and interests cannot be imported into the exercise of the discretion because the application was a proceeding in respect of a procedural and evidentiary issue, not a proceeding under the Care of Children Act 2004 (COCA). I reject the submission. The application was interlocutory[5] which is by definition:

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[3] Section 142 relevantly provides that the court may make any costs order as it thinks fit. Consistent with that r 207 of the Family Court Rules 2002 (FCR) gives the court discretion to award costs in any proceeding and in its exercise permits application of any or all of rr 14.2 to 14.12 of the District Court Rules 2014 (DCR).

[4] See for instance *PRH v CTB* [2012] NZHC 674 (Heath J) and *H v M* [2015] NZHC 3264 (16 December 2015) (Keane J) emphasising consideration of a child's welfare and best interests in the context of COCA costs decisions.

[5] Rule 170(2) FCR.

> "… an application in proceedings or intended proceedings for an order or a direction relating to a matter of procedure or for some relief ancillary to the orders or declaration sought in the proceedings or intended proceedings"[6]

The application for an evidentiary ruling was therefore an application in the substantive COCA proceeding, not distinct from it.

[7] Mrs [Roth]'s submission that Mr [Roth] was not successful because there was no determination of the application is disingenuous. Both parties rehearsed in some detail their respective arguments on the evidential issue. It is too late to do so in respect of considerations of success or failure. An outcome was reached. That it occurred by Mrs [Roth] electing to withdraw the evidence rather than being ordered to do so by the court does not change the substance of that outcome – it was that sought by Mr [Roth] upon his application and in earlier negotiations. On that measure Mr [Roth] was successful.

[8] Merit considerations do however have relevance to litigation conduct because there is a nexus between the strength of a claim or an opposition on one part and the reasonableness of advancing and maintaining either on the other part. That nexus is dynamic in response to the multiple factors that emerge during the course of litigation. In respect of the parties' respective litigation conduct I find the following material:

(a) The processes established by the Family Court to consider without notice applications, whereby a duty judge receives applications and evidence electronically and generally without access to the entirety of the court file if there are pre-existing proceedings, might make it necessary to proffer in affidavit evidence relevant parts of the court record to which the judge is unlikely to have immediate access. If there was such a need in this instance, it had passed when the application was directed to proceed on notice because the judge (or judges) who would subsequently consider matters would have access to the full report.

[6] Rule 8(1) FCR.

(b) The reason for Mrs [Roth]'s change of position other than that upon receiving the court directed psychological report[7] "the proceedings had progressed to such a point where it was in her view no longer necessary to argue that her evidence should remain on file"[8] appears arbitrary. The part of her evidence to which objection was taken formed, and would remain, part of the court record independently of its reproduction in her affidavit. The provision of the psychological report was irrelevant to that circumstance.

(c) The utility and motive of Mr [Roth]'s pursuit of the application might be questioned for very reason that the material complained of does remain part of the court record. Nevertheless, proceedings in the Family Court are subject to rules of evidence[9] and governed by rules of process to ensure they are dealt with, inter alia, as fairly, inexpensively, simply and speedily as is consistent with justice.[10] Mr [Roth]'s application had statutory and regulatory foundation and on the face of it an arguable case. Whether he may have succeeded is another matter. But given that there was foundation and an argument to be made and that there were attempts to resolve the matter by negotiation prior to making the application, I do not consider his conduct in bringing and maintaining the application unreasonable.

[9] Taking the above matters into account I find that Mrs [Roth] should have compromised her position to that taken at the hearing when first invited to do so and that Mr [Roth] has been put to the unnecessary effort and expense of bringing and prosecuting the application to the point of the hearing date. As such it is appropriate, subject to matters addressed next for an order for costs to be made against Mrs [Roth].

[10] Mrs [Roth]'s' receipt of a grant of legal aid brings into play s 45 of the Legal Services Act 2011 (LSA) the effect of which, in broad terms, is as follows:

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[7] Released by the court to counsel for discussion with the parties on 25 February 2020.
[8] Submission of counsel for Mrs [Roth] dated 25 March 2020 at [16].
[9] Section 12A(4) Family Court Act 1980.
[10] Rule 3(1)(a) FCR.

(a) Costs cannot be ordered against Mrs [Roth] unless there are exceptional circumstances.

(b) If costs are ordered they must not exceed what is reasonable in the circumstances, including the means and conduct of the parties and the order must specify the amount that would have been ordered if Mrs [Roth]'s liability was not affected by the provision.

(c) If costs are not ordered the court may make an order specifying what order for costs would have been made if Mrs [Roth]'s liability was not affected by the provision.

[11] For reasons already given I find two of six s 45(3) LSA indicia of exceptional circumstances present, that being conduct that caused Mr [Roth] to incur unnecessary cost and the unreasonable pursuit of the opposition when the necessity for the evidence in the manner presented had passed. That said, the consequences of Mrs [Roth]'s conduct have not prejudiced Mr [Roth] in respect of the substantive issue and were unlikely to ever do so given that the material has always formed part of the court record. Nor was there behaviour by Mrs [Roth] in the nature of deceit or abuse of litigation process as to unnecessarily prolong either the interlocutory or substantive matter. In overall context and adopting the position previously taken by this court as to the high threshold for exceptional circumstances,[11] I am not moved to find that they are present in this case.

[12] However, I do consider it appropriate to specify what order for costs would have been made if Mrs [Roth]'s liability had not been affected by the LSA. In doing so I consider it appropriate to take into account the relevant DCRs. Applying the costs scale in the rules calculated on a category 2B[12] basis Mr [Roth] seeks an order for costs of $2,674.00 for proceeding steps 9.10, 9.12[13] and 9.14.

[13] Further, I hold material that visiting a financial sanction upon Mrs [Roth] will be potentially disadvantageous to the children when in her care. The extent of any

[11] *M v A [Costs]* [2006] NZFLR 441.
[12] DCRs 14.13 and 14.15 and schedules 4 and 5.
[13] Claiming 0.75 days for written submissions rather than the scale of one day.

such disadvantage cannot be quantified because there is no evidence of Mrs [Roth]'s mean other than that she is receives work and income support and of course that she is in receipt legal aid. To strike an appropriate balance between the cost principles and welfare considerations, had I ordered costs it would have been in the sum of $1,500.00.

[14] Accordingly, I make an order pursuant to s 45(5) LSA specifying that Mrs [Roth] would have been ordered to pay costs of $1,500.00 had her liability not been affected by the LSA.

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Judge SD Otene
Family Court Judge