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[SQUARE BRACKETS]

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**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

**FAM-2019-004-001072
[2020] NZFC 5254**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[SIDNEY HAMMOND] Applicant
AND	[OPHELIA CRESPO] Respondent

Hearing: 2 July 2020

Appearances: Z Matheson for the Applicant
S Cummings for the Respondent
B Maclean as Lawyer for the Children

Judgment: 2 July 2020

ORAL JUDGMENT OF JUDGE K MUIR

[1] This is an application under s 46R Care of Children Act 2004 about how a young boy [Conrad Hammond Crespo] born [date deleted] 2012, who is now aged eight, should be educated for the remainder of the 2020 school year. It is also about where he should go to school.

[2] [Conrad]'s [father], [Mr Hammond], and [Conrad]'s [mother], [Ms Crespo], are unable to agree on this issue. Both of them are [Conrad]'s guardians.

[3] [Ms Crespo] would like [Conrad] to continue to be home schooled until the end of 2020 and it is then her preference that [Conrad] attend [School A], a central Auckland primary school that is very close to her home at [address 1].

[4] [Mr Hammond] has concerns about home schooling continuing. He would like [Conrad] to attend [School B] immediately – or at least at the start of term 3, because we are now very close to the term school holidays. [School B] is a school that is relatively close to [Mr Hammond]'s home.

[5] This is not the only issue that these parties have before the Courts. The essence of the other issue is a dispute about how much time [Conrad] and his brother [Dion], who is 14 years old, should spend in each parent's household. [Dion] attends [School C] and [Dion]'s contact with [Ms Crespo] and [Mr Hammond] is on a similar pattern to [Conrad]'s.

[6] This matter came before me on 25 May 2020 and in two separate decisions that I delivered that day I expressed my concern that the apparently straightforward issues in this case have already generated well in excess of 1200 pages of evidence. Proceedings were only filed in November 2019. That is an indication of the high level of conflict between the two parents involved in this case. Regrettably much of the evidence filed appears to me to be focussed on adult issues and arguments, for example issues surrounding why they are separated or why they are in conflict.

[7] As well as the issue of how and where [Conrad] is to be schooled, I am today required to determine whether or not I should admit in evidence a report prepared by a psychologist, Dr Michael Smith.

The Issues

1. Is the evidence of Dr Michael Smith admissible? Should I allow it to be read as part of the evidence?
2. Should [Conrad] continue to be home schooled until the end of 2020 and then attend [School A] as [Ms Crespo] wishes? Alternatively, should [Conrad] commence school at [School B] at the start of the third school term in 2020 as [Mr Hammond] wishes? The final alternative is that [Conrad] might attend [School A] at the start of the third school term in 2020.

Dr Smith's Evidence

[8] There is already before the Court evidence from two other psychologists. The first is a report by Prakesh Grover. This is a "*Psychology Assessment of Cognitive Abilities and Educational Abilities*" of [Conrad], which is dated 22 January 2020. [Conrad] was assessed on 11 January and 22 January. The report was prepared with the consent of both parents. They recorded their agreement to the preparation of the report in a handwritten document that was dated 19 December 2019. They also actively participated in the preparation of the report by providing extensive information to Dr Grover about their concerns and perceptions concerning [Conrad]'s educational progress. I note that Mr Grover's assessment report was addressed and delivered to both parties although [Mr Hammond] has exhibited to his evidence and he evidently paid the cost.

[9] The second psychologist report before the Court is attached to an affidavit by Ms Robyn Stead, affirmed 19 May 2020. Ms Stead is a registered educational psychologist and a registered teacher. Her evidence is adduced by [Mr Hammond] in circumstances which are discussed in the decision which I delivered on 25 May 2020.

[10] [Mr Hammond] had leave to file affidavits strictly in reply to evidence from [Ms Crespo]. That evidence in reply should have been filed by 3 March 2020. Judge Manuel's directions in that regard were clear. I expressed my concern that the evidence

was filed late, in fact it was not received by the Court until 19 May 2020 for reasons that were never properly clear. I was also concerned that the evidence that [Mr Hammond] filed, including an extensive and lengthy affidavit by him, could not be described as being evidence in reply. The evidence was much more extensive than that. To that date [Ms Crespo] had filed no psychological evidence. Leave ought to have been sought and it was not.

[11] On 25 May 2020, [Ms Crespo] was seeking leave to file evidence from Dr Smith which she described as being an affidavit addressing [Conrad]'s educational needs in the context of his psychosocial and emotional self. She said that she had not been in a position to file it before because Dr Smith was concerned about the potential ethical consequences of his preparing and filing such a report without consent of both guardians or without approval of the Court.

[12] [Mr Hammond] opposed the evidence being filed. I was concerned about the delay by [Ms Crespo] in seeking leave from the Court to file the psychological evidence, given that she had been in receipt of [Mr Hammond]'s psychological evidence since April 2020. I was also concerned at the ballooning evidence in this matter, in face of a clear direction that Judge Manuel had made limiting the evidence that was to be filed. I indicated that I would read Dr Smith's evidence in support of Mr Cumming's application to have it admitted and then determine its admissibility at this hearing. However, as a consequence of that, a hearing that had been set down for the express purpose of deciding where [Conrad] was to be schooled had to be adjourned until today, which has brought us close to the start date for the next school term.

[13] It is clear to me that the parties had agreed that [Ms Crespo] could obtain an opinion such as the opinion given by Dr Smith. That is recorded in the agreement that they signed on 19 December 2019 where it is said:

“[Ophelia] to prepare by 1.00 pm on Friday 20 December options to [Sidney] for a holistic assessment of [Conrad]'s educational needs in the context of his psychosocial and emotional self. [Sidney] to advise whether or not he agrees to any of those options by 4.00 pm on 20 December. Costs to be shared of this report. Instruction to be arranged ASAP. Agreement not to be unreasonably withheld.”

[14] [Mr Hammond] subsequently declined to agree to any of the options suggested by [Ms Crespo] for the assessment. He claimed that he was entitled to do so because the people proposed were not “*educational psychologists*”. However, it was not a condition of the agreement dated 19 December that the assessment be by an educational psychologist. That however does not determine whether or not Dr Smith’s evidence is admissible or ought to be read.

[15] In submissions for the hearing [Mr Hammond] asserted that it was not unreasonable to require that an assessment of educational needs be done by an educational psychologist. It was submitted that lawyer for the child had expressed his view about the issue, however on reading the email that was referred to Mr MacLean did not comment at all on the issue of whether [Ms Crespo] should instruct an educational psychologist. [Mr Hammond] also said in his submissions that it was confirmed by the New Zealand Psychological Society that the assessment should be undertaken by an educational psychologist. However the email referred to simply says, “*Educational psychologists do these kind of assessments*”.

[16] Concern is expressed in [Mr Hammond]’s submissions that [Ms Crespo] had arranged for Dr Smith to speak to [Conrad] twice during the COVID-19 lockdown period without the consent of [Mr Hammond]. [Ms Crespo] was evidently present some of the time and that is an additional concern. It was submitted that the process of obtaining the report was flawed and therefore the report was flawed to start with and that the Court should refuse to accept it for those reasons.

[17] [Mr Hammond] submits the evidence should not be read because it was obtained too late. However I note that the evidence filed by [Mr Hammond] from Ms Stead was also late and did not comply with the direction that only evidence in reply should be filed. Despite my concern about the delays in [Ms Crespo] seeking leave for the evidence to be filed, I accept that its preparation may have been hampered by [Mr Hammond]’s refusal to give consent. I find that it was not reasonable for [Mr Hammond] to withhold consent. It is a regrettable symptom of the conflict between [Mr Hammond] and [Ms Crespo].

[18] The submission is made on behalf of [Mr Hammond] that Dr Smith assessing [Conrad] was improper, that it was a breach of [Conrad]’s rights, a breach of [Mr Hammond]’s guardianship rights and stepped across the role of lawyer for the child. However it is also drawn to my attention by [Mr Hammond]’s submissions that Dr Smith’s report makes no reference to his assessment of [Conrad]. In my view, whether or not it was improper that Dr Smith assess [Conrad] is not a matter that fatally affects the admissibility of his evidence.

[19] [Mr Hammond] also submits that Dr Smith is not appropriately qualified to give evidence of [Conrad]’s educational needs because he is not an educational psychologist. The evidence to that effect seems to be that he is not registered in that specialty with the relevant professional board, he is rather listed in the general category of psychologists. That issue may carry some weight. I need to assess it in light of the evidence that Dr Smith has now filed. However, Dr Smith may have sufficient expertise in the field of educational psychology to enable him to give an expert opinion even if that is not his core specialty.

[20] Perhaps more cogently, it is argued that Dr Smith’s evidence does not comply with the Code of Conduct for Expert Witnesses. The Code of Conduct for Expert Witnesses is as set out below:

Duty to the Court

1. An expert witness has an overriding duty to assist the court impartially on relevant matters within the expert’s area of expertise.
2. An expert witness is not an advocate for the party who engages the witness.
- 2A. If an expert witness is engaged under a conditional fee agreement, the expert witness must disclose that fact to the court and the basis on which he or she will be paid.
- 2B. On subclause 2A, conditional fee agreement has the same meaning as in rule 14.2(3), except that the reference to legal professional services must be read as if it were a reference to expert witness services.

Evidence of Expert Witness

3. In any evidence given by an expert witness, the expert witness must—
 - (a) **acknowledge that the expert witness has read this code of conduct and agrees to comply with it:**

- (b) state the expert witness' qualifications as an expert:
 - (c) **state the issues the evidence of the expert witness addresses and that the evidence is within the expert's area of expertise:**
 - (d) **state the facts and assumptions on which the opinions of the expert witness are based:**
 - (e) **state the reasons for the opinions given by the expert witness:**
 - (f) specify any literature or other material used or relied on in support of the opinions expressed by the expert witness:
 - (g) describe any examination, tests, or other investigations on which the expert witness has relied and identify, and give details of the qualifications of, any person who carried them out.
4. If an expert witness believes that his or her evidence or any part of it may be incomplete or inaccurate without some qualification, that qualification must be stated in his or her evidence.
 5. If an expert witness believes that his or her opinion is not a concluded opinion because of insufficient research or data or for any other reason, this must be stated in his or her evidence.

Duty to Confer

6. An expert witness must comply with any direction of the court to:
 - (a) confer with another expert witness:
 - (b) try to reach agreement with the other expert witness on matters within the field of expertise of the expert witness:
 - (c) prepare and sign a joint witness statement stating the matters on which the expert witnesses agree and the matters on which they do not agree, including the reasons for their disagreement.
7. In conferring with another expert witness, the expert witness must exercise independent and professional judgment, and must not act on the instructions or directions of any person to withhold or avoid agreement.

(emphasis added)

[21] Three points are made on behalf of [Mr Hammond]. Firstly, Dr Smith refers to being familiar with the Code of Conduct but does not state that he agrees to comply with the Code of Conduct contrary to clause 3(a). Secondly, he does not confirm that the evidence he gives is within his area of expertise and that is contrary to clause 3(c). Thirdly, he makes no reference to the fact that spoke to [Conrad] and that is contrary

to clause 3(d) which requires him to state the facts and assumptions on which his opinions are based.

[22] It is also submitted that if it is read by the Court little or no weight should be attached to it because of a number of omissions and errors. These include allegedly a failure to adequately reference Mr Grover's report or to adequately reference Ms Stead's report.

[23] It is also submitted that there are some facts, which I am told are highly relevant, are not referenced in the report. They include the recent COVID-19 lockdown and the fact that children will be attending schools after either a break from education or perhaps after returning from overseas, which it is said will lessen the impact of [Conrad] being isolated as a pupil starting school partway through the year. I am told that it should also be a concern that it fails to reference evidence from both [School B] and for that matter [School A], that they are used to transitioning new pupils during the school year. For all of those reasons it is urged on me that I should not admit Dr Smith's evidence.

[24] In support of the proposition that Dr Smith's evidence ought to be admitted and read, counsel for [Ms Crespo] said that his qualifications are in fact superior to those of Ms Stead or Mr Grover. I am told that Dr Smith has worked directly in roles dealing with significant educational issues as recorded in his affidavit. I am also told that the report was filed at the first opportunity, as soon as Dr Smith had authority from the Court to prepare it.

[25] There is a focus in the submissions of counsel for [Ms Crespo] on comparing Dr Smith's evidence with the report of Prakash Grover (a report prepared with the consent of both parties) and with the evidence of Ms Stead. There is also a focus on a comparison of their qualifications.

[26] [Ms Crespo]'s submissions do not focus directly on the issue of Dr Smith's compliance with the Code of Conduct for Expert Witnesses. They also do not focus directly on the weight that I can give to Dr Smith's evidence in light of the fact that the affidavit contains a number of rather bald statements of opinion without reference

to facts or to the assumptions on which his opinions are based and without detailed reasons for his opinions.

Analysis

[27] I note at this point the provisions of s 25 Evidence Act 2006:

Admissibility of expert opinion evidence

- (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
- (2) An opinion by an expert is not inadmissible simply because it is about—
 - (a) an ultimate issue to be determined in a proceeding; or
 - (b) a matter of common knowledge.
- (3) If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be provided or judicially noticed in the proceeding.
- (4) If expert evidence about the sanity of a person is based in whole or in part on a statement that the person made to the expert about the person's state of mind, then—
 - (a) the statement of the person is admissible to establish the facts on which the expert's opinion is based; and
 - (b) neither the hearsay rule nor the previous consistent statements rule applies to evidence of the statement made by the person.
- (5) Subsection (3) is subject to subsection (4).

[28] In summary, expert evidence is admissible if I am likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

[29] It is of concern to me that while Dr Smith says he is familiar with schedule 4 High Court Rules, the Code of Conduct for Expert Witnesses and while he annexed a copy of the code to his affidavit, he does not specifically say that he agrees to comply with it. That is a requirement.

[30] He does not specifically say that the evidence he gives is within his area of expertise. If that were the only deficiency I might be prepared to infer that it was within his expertise given the information that is set out in the section labelled “*Background*” in his report.

[31] However of more concern to me is the fact that his report does not consistently provide details of the basis or reasons for the opinions he gives. It does not state the facts and assumptions on which his opinions are based.

[32] I note for example in his report he discussed the possibility of a placement for [Conrad] with either [School A] or [another school] as an alternative. He was able to explain why [School A] was in his opinion, “*The mainstream school of choice*”, between the two because of its geographical proximity to the [Ms Crespo] who he describes, arguably inaccurately as, “*The predominant caregiver*”. He says both schools have acceptable reports from the Educational Review Office. He does not reference [School B] at all. He does not explain why he has not referenced [School B] despite being a key issue in these proceedings.

[33] Later in his report he speaks of the need to, “*Mitigate potentialities of [Conrad] being stigmatised, and potentially ostracised*”. He does not say why he believes [Conrad] might be stigmatised or ostracised if he were to enter a mainstream school at the start of a term rather than the start of the year. He references no facts or data to indicate that there is a likelihood of that occurring in either [School B] or [School A].

[34] On a number of occasions Dr Smith uses the phrase, “*From my experience*”: “*From my experience children entering mainstream schools for the first time require time to appropriately adjust.*”: “*In my experience I do not support placement of a child into mainstream schooling during the year unless exceptional circumstances dictate.*”.

[35] Reference to his experience, without any explanation as to what experiential data if any he is relying on is unhelpful. This does not comply with clause 3(d) of the Code of Conduct.

[36] He does give some explanation as to why he thinks placing [Conrad] in either AGE School or Arrowsmith School in Takapuna or St Heliers might be appropriate. However the parents are not thinking that [Conrad] would attend either of those schools.

[37] There are also some assumptions or statements of fact in Dr Smith's report which I do not consider are supported by the evidence. When he said, "[School A] is situationally favourable to [Ophelia], being the predominant caregiver," I consider he was in error. The current parenting agreement provides for [Conrad] to be cared for six nights per fortnight by his [Mr Hammond] and eight nights per fortnight by his [Ms Crespo]. Dr Smith does not explain why he considers that makes [Ms Crespo] the predominant caregiver or why that additional night should carry the day. The *Oxford Dictionary* defines predominant as "*having supremacy or ascendancy over others; predominating or constituting the main or strongest element; prevailing.*"

[38] I find that there are a number of aspects of Dr Smith's evidence that do not comply with the Code of Conduct for Expert Witnesses. I also find given those omissions or errors, that his failure to undertake to comply with the code, and his failure to state that the opinions he gives are within his expertise are a matter of real concern.

[39] The main issue with Dr Smith's evidence is that it is not particularly helpful and does not address the comparisons that I am effectively called on to make. Will [Conrad]'s educational needs be better met by his continuing with home schooling, if not are his needs better met by his attending [School B] or [School A]?

Decision

[40] In the end, the extent to which Dr Smith's report does not comply with the Code of Conduct is so significant that I do not consider that I should allow it to be admitted and read as expert evidence. In the event that I were wrong about that, I would have placed relatively little weight on it for the reasons set out above and in particular because for reasons which are unknown to me, Dr Smith gives no information in relation to [School B] at all.

Current Care and Contact Arrangements

[41] Since Judge Manuel's decision on 28 January 2020 [Conrad] and his brother have been cared for by [Ms Crespo] eight nights per fortnight and [Mr Hammond] six nights per fortnight. An indication of the conflict and intractability between them is that the extra days that would be needed to make the holidays equally shared effectively amount to, on my calculation, approximately six days per year. The parents are unable to agree on whether or not that should happen, but they are both adamant that it is an important issue, when it is only six days out of 365 days. The parents are also unable to be moved on the prospect of [Conrad] being able to go away with either parent for a longer holiday. The prospect that that might happen was completely discounted. I am not required to make a decision on either of those issues today but it is an indication of the level of conflict that exists here.

[42] Although the parties were in a de facto relationship for 25 years it would be an understatement to describe their separation as being high conflict. Although the parties were directed to communication counselling that does not seem to have yet had a material impact on their ability to communicate constructively.

[43] [Conrad] has received all of his education to date through home schooling. Evidently while the parties were together they agreed that [Conrad] need not enter formal education until he was seven. This is apparently in line with the practice in some Scandinavian countries, or perhaps the philosophies of Rudolf Steiner.

[44] [Ms Crespo] makes the point that it was [Mr Hammond] who completed the application for an exemption allowing [Conrad] to be home schooled. [Mr Hammond] says that was in the context of the family having relocated to [suburb 1] from [suburb 2] where they were not in zone for suitable schools.

[45] [Mr Hammond] currently lives in [suburb 3], 500 metres from [School B] and presumably a 25 minute walk from [School A]. [Ms Crespo] lives at [address 1] which Google Maps tells me is a seven minute walk to [School A] and a 29 minute walk from [School B]. I understand that the three older children attended [School A] for a period of time, although they were also home schooled for a period of time. [Ms Crespo]

tells me that the two older children having been home schooled for a period of time both went on to do very well when they entered mainstream education.

[46] It is [Ms Crespo]'s evidence that in 2018 she tried to persuade [Mr Hammond] to agree to [Conrad] attending the local primary school in [suburb 1]. When he declined she committed to home school [Conrad], abandoning her own [studies]. She has made a huge commitment and sacrifice which she is to be commended for. As a consequence though she has a lot invested in [Conrad]'s home schooling.

[47] It seems that [Ms Crespo]'s principal opposition to [Conrad] attending school now is as she says, *"It is obvious that a child that has not been given any formal schooling before seven years old is going to be adversely effected in their confidence and social development if they are thrown into mainstream schooling two years behind her peers."* But she then says that, *"When [Conrad] is ready, at the start of the next year, I would love him to go to [School A]."*

[48] For some time [Conrad] has been home schooled by [Ms Crespo] when he is in her day-to-day care and by [Mr Hammond] when he is in his day-to-day care. [Ms Crespo] does not work and is evidently willing to remain committed to [Conrad]'s home schooling at least to the start of next year. [Mr Hammond] says that he is deliberately working part-time so he can focus his time on the care of [Conrad] and presumably [Dion] as well when [Conrad] is with him.

[49] That has meant that unfortunately [Conrad] is being home schooled in two distinctly different ways by his two parents. [Ms Crespo]'s approach is to use a series of workbooks. Samples of them were attached to the affidavit of Dr Stead sworn 19 May 2020. [Ms Crespo] also maintains an exercise book labelled *"[Conrad]'s home school programme"* in which she records his work for the day.

[50] [Mr Hammond] has evidently declined to record [Conrad]'s progress using that notebook. [Ms Crespo] evidently refuses to read notes about his progress in any other format.

[51] Exhibit E to the affidavit of Ms Stead is a typed learning plan for [Conrad] for term 1 2020 which [Mr Hammond] has prepared. Exhibit G are a series of typed notes and photographs outlining [Conrad]'s learning programme with [Mr Hammond]. Exhibit H is a series of assessment reports from an online maths programme, MathsBuddy, which [Conrad] completes when he is with his [Mr Hammond].

[52] It should be a matter of concern to both parents that they are unable to agree on a programme, on a curriculum or on a consistent educational approach for [Conrad]. [Mr Hammond]'s evidence includes significant expressions of concern about his belief that [Conrad] is not being properly educated by [Ms Crespo]. [Ms Crespo] produces affidavits from a number of witnesses which attest to her intelligence and dedication to the home schooling of [Conrad].

[53] They include an affidavit from a teacher, Sarah Holt, who says that based on [Conrad]'s age and the fact he has been home schooled the best transition for him would be to a Steiner School. A friend, [name deleted], has children of similar ages and describes [Conrad] as a talented child. She is complimentary of home schooling in general.

[54] Another teacher, [name deleted], has read the report prepared by Mr Grover and says that she has been assisting [Ms Crespo] in establishing a programme addressing concerns raised by Dr Grover. Another friend, [name deleted], attests to [Ms Crespo]'s dedication to her children and speaks well of home schooling in general.

[55] None of those affidavits address the concern I have, which is a concern that is echoed in the evidence of Ms Stead. That concern is that [Conrad] does not appear to be receiving a consistent, well planned home schooling education in good part because his parents cannot or will not agree on how to teach him. In fairness, I should say that given the high level of endemic conflict between them, it would be very difficult for them to be able to co-operate on something as significant as home schooling.

[56] There was also regrettably an affidavit filed by [Ms Crespo] from their eldest son, [Kieran]. I say regrettably because even although he is an adult his involvement as a witness in this proceeding can only emphasise and deepen the regrettable rift that

has developed in this family. [Kieran] speaks in glowing terms of his [Ms Crespo]'s educational abilities. I am not inclined to place any weight on his evidence in the circumstances although I do not question his integrity nor his love or concern for his mother.

[57] [Ms Crespo]'s concern is that [Conrad] is significantly behind in terms of his educational achievements for his age and that he should not be exposed to mainstream school until he has caught up through further home schooling. I do not have any evidence which indicates that (assuming [Conrad] is behind educationally) he is likely to catch up if he continues to be home schooled. I am particularly concerned about his ability to catch up if he continues to be home schooled using two different approaches.

[58] Ironically, one of [Mr Hammond]'s principal concerns is also that [Conrad] is significantly behind in terms of his educational achievements for his age. [Mr Hammond] says therefore it is important that he enter a mainstream school as soon as possible so that he can catch up.

[59] I have carefully read the report that was prepared by Prakesh Grover. It does not, on my reading, raise significant concerns for [Conrad]'s educational progress or prospects. [Conrad] was assessed to be of overall average general intellectual capacity. There were significant differences between his verbal comprehension and fluid reasoning skills. They were significantly better developed than his working memory and processing speed.

[60] In verbal comprehension he ranked in the average range. He did experience some difficulties in vocabulary. In his fluid reasoning index (which deals with the ability to solve novel problems independent of previous knowledge), he scored in the good average range. However his working memory index was at the bottom of the average range. His processing speed index (which deals with visual processing speed and manual dexterity skills) scored in the low average range.

[61] In addressing [Conrad]'s educational profile Mr Grover noted that [Conrad] had only started his formal learning nine and a half months ago. However in assessing

his literacy skills his word reading was in the low average range, his spelling was at the bottom end of average range and there were concerns about his written expression. He reads for meaning and accuracy below the expected level for his age. In terms of number skills, his numerical operations were at the bottom end of the average range. Dr Grover's report concluded with a list of strengths and weaknesses and a series of recommendations.

[62] Dr Grover's report did not address the issue of whether any concerns about [Conrad]'s progress would best be dealt with through home schooling or in a school environment. He did however respond to an emailed enquiry about whether his recommendations could be implemented in a State school by saying, "*Yes my recommendations can be followed by any educational setting.*" He said teacher aide support may be required in a school setting.

[63] The essence of Dr Grover's report is that, rather than being a raw expert opinion, it is rather a report on a series of tests that have been administered to [Conrad] and how he measures against standardised norms based on those tests.

[64] Mr Grover has not filed an affidavit, his report is simply indexed as an exhibit.

[65] Ms Stead has provided an affidavit. In it she confirms that she has been given a copy of the Code of Conduct for Witnesses and agrees to comply with it. She says that the evidence she is giving is within her area of expertise and experience and I am satisfied that her expertise and experience is sufficient and her qualifications are suitable for her to give expert evidence on the issues put to her. Those issues included:

- (a) Whether you would expect [School B] would be able to implement Dr Grover's suggestions/integrate [Conrad] in a way that meets his needs.
- (b) Whether all things being equal it would in your opinion likely better serve [Conrad]'s needs for him to attend school rather than continue in home schooling in circumstances where there is apparently no chance of any collaboration between his parents about the way he is to be

taught and where there is tension between the parents about whether [Conrad] should be home schooled at all.

- (c) What benefits if any there may be for a child in attending a mainstream school in circumstances where his parents are engaged in (unfortunately) a high conflict separation.
- (d) Your view on the merits or otherwise of the [Ms Crespo]'s stance which is that if [Conrad] starts at a normal school before he is at average or better levels in terms of age, he may be viewed as behind or below other students by teachers and peers and begin to take that view of himself, negatively effecting his self-esteem.
- (e) To the extent possible, whether the programmes being followed by the respective parents meet the recommendations of Dr Grover and serve [Conrad]'s interests.
- (f) Are [Conrad]'s educational psychology results and any concerns raised based on this linked to his being home schooled?
- (g) Does the fact that Prakesh Grover did not extensively refer to his home-schooling history impact the utility and accuracy of the report?
- (h) Is it the case that education in a Steiner School could also adequately address [Conrad]'s needs?

[66] Ms Stead goes on to address each of those issues in her report. In summary, she concludes that Mr Grover's recommendations could be implemented by [School B] as and if they were needed, to support [Conrad]'s learning.

[67] She notes that [Conrad]'s educational needs are within the capability of a local school. She notes that given the lack of collaboration between parents, [Conrad]'s educational needs might be better served by a local school. She also points out the benefit of [Conrad] mixing with his own peers.

[68] She emphasises a key benefit of the mainstream school which is that the educational programme will be provided by trained and registered teachers.

[69] [Conrad] will also see adult relationships modelled to him which are free from the stress and upset that his parents are likely undergoing. His attendance at school may mediate some of the conflict being created by the home school programme. Ms Stead says that [Conrad] would be, “*Somewhat insulated from this conflict if he is able to attend school.*”

[70] Addressing [Ms Crespo]’s concern about [Conrad] attending school when he is “*behind peers,*” Ms Stead notes that teachers commonly group students of different ability together and groups of the same ability together, so that children can see more advanced skills being modelled by same-aged peers, and yet still feel supported in their endeavours to learn.

[71] In answer to whether the programme that is being followed by the parents meet the recommendations of Dr Grover, Ms Stead was unable to make any conclusions based on the paperwork she had seen. She was concerned, however, that despite the fact that both parents appeared to care deeply about [Conrad]’s education, she was unsure that they are able to serve [Conrad]’s best interests because of the high level of conflict evidenced.

[72] She also expressed concern that [Conrad]’s voice is conspicuously absent from most of the documentation as to schooling at both [Ms Crespo] and [Mr Hammond]’s homes. She noted a current focus in schools around developing opportunities for children to express their voices or thoughts and opinions about learning.

[73] Ms Stead was unable to comment on whether [Conrad]’s assessment results, as reported by Mr Grover, are related to his home schooling, as she was not the one who administered the tests, Mr Grover was.

The Law

[74] Section 16 Care of Children Act sets out the rights, duties, powers and responsibilities of guardians. It includes a list of important matters affecting children

which include, at s 16(2)(d), “*Where and how the child is to be educated.*” Because both the parents are guardians, this decision, like all guardianship decisions, must be made jointly. It is only where the parents cannot decide that the Court may determine the issue.

[75] In any decision made by this Court under the Care of Children Act, the focus has to be on this particular child in these particular circumstances. [Conrad]’s best interests and welfare is the primary, and really the only, focus. I need to take into account the child’s views pursuant to s 6, and I need to be guided by the principles in s 5, which are society’s guiding principles on what we consider to be in the children’s welfare and best interests.

[76] The important issues in s 5 for these purposes include s 5(a), which require me to protect a child’s safety, in particular, from all forms of violence; 5(b), which emphasises that [Conrad]’s care, development and upbringing should be primarily the responsibility of his parents and guardians. Section 5(c) is important. It emphasises that [Conrad]’s care, development and upbringing should be facilitated by ongoing consultation and co-operation between his parents and guardians. Section 5(d) is also relevant. [Conrad] needs to have continuity in his or her care, development and upbringing. I do not consider either 5(e) or 5(f) are particularly relevant to this case. Whichever solution is applied here, [Conrad] will remain in close touch with both sides of his family.

[77] However, the principles in s 5 do not greatly assist the Court in this very fact-specific case. There is no issue that both parents should not be involved in these decisions and, indeed, in the care and upbringing of [Conrad] for the balance of [Conrad]’s childhood.

[Conrad]’s Views

[78] I am required by s 6 to take account of the views expressed by [Conrad]. He has had an opportunity to express his views to his lawyer, Mr MacLean. In his first meeting with Mr MacLean in December 2019 [Conrad] simply said he was going to be home schooled. I did not read that as actively expressing a preference as to

schooling. Mr MacLean met with [Conrad] again on 3 May 2020. The meeting was perhaps difficult because it was being held outdoors during COVID-19 conditions. [Conrad] was described as being reluctant to engage, although Mr MacLean said that he did not consider that reluctance was as a result of the circumstances of the meeting. Mr MacLean asked him whether he liked home schooling. He answered, *“I like home school.”* He was asked whether he knew what his parents thought about him being home schooled. He said [Ms Crespo] likes him to be home schooled and [Mr Hammond] did not. He then volunteered, *“I don’t know how he [Mr Hammond] feels.”*

[79] When he was asked what age he thought it would be good to transfer to a regular school he replied, *“I don’t know when I would like to go to school, about 14 I suppose.”* It might be noted that his brother is about 14 now. It was evident from that interview that [Conrad] was aware about what his [Ms Crespo] wants, indeed acutely aware. When he was asked about his care pattern he expressed a preference and when asked why he said, *“Mum misses me, she tells me she misses me a lot. She says it to me every time and that it would make her happy.”* On the other hand when he was asked what his father thought he said, *“I don’t know what Dad would be thinking about that, I do not know that, it’s his own mind but I don’t know his mind but I do know my mother’s mind.”*

[80] I need to bear in mind that [Conrad] is eight years’ old. My task is not simply to do what [Conrad] wants. I have to take account of his views and it is important that I respect them but ultimately the decision I make must be one that promotes his welfare and best interests.

Home School or State School

[81] [Ms Crespo] submits that it is important that [Conrad] has only ever been home schooled. She says the fact he is behind his peers when compared with national standards does not reflect the efficacy of home schooling because:

- (a) It was by agreement that they adopted the [name of system deleted], where people are not taught reading and writing until age seven.

- (b) [Conrad]’s brothers had been home schooled and achieved well educationally.

[82] [Ms Crespo] says it cannot be considered in [Conrad]’s welfare and best interests that he be thrust into mainstream schooling before he is ready. She says that introduction to a large educational institution should be delayed until there is a proper lead-in. She says the success of [Conrad]’s older siblings should inform the Court that [Conrad]’s education is not being compromised. She says that [Conrad] has already been subject to significant turbulence and for him home schooling is familiar and likely to be comfortable. She says in contrast mainstream schooling will be an entirely new environment. It is also urged on me that making a decision appropriate to the child’s sense of time does not necessarily mean making an early or prompt decision. I am urged to allow time for [Conrad] to bridge gaps in his learning so that he can easily move to the mainstream environment and “*avoid the consequences of being perceived as lacking intelligence, being incompetent or otherwise unusual.*” I am told that [Conrad] should have the opportunity and time at his own pace to cope with what is going to be a major adjustment.

[83] In her latest submissions, [Ms Crespo] tells me that it is, “*Common sense,*” that [Conrad] will find a shift to mainstream schooling stressful.

[84] Both parents profess in different ways to demonstrate a commitment to [Conrad]’s well-being. If that energy and commitment was harnessed effectively, they might over time reach a point where they are able to minimise the risk to [Conrad] that arises from the transition to school.

[85] Addressing the issue of conflict, counsel for [Ms Crespo] effectively suggested that it is [Mr Hammond] who generates conflict to his own ends. He gave as an example the refusal to receive the worksheets provided by [Ms Crespo] for home schooling. It was suggested that directions from the Court would resolve that issue easily. It was suggested that the Court should make detailed orders as to how [Conrad] should be home-schooled and to how his transition to [School A] should be managed.

[86] [Ms Crespo] rejected the argument that putting [Conrad] into mainstream schooling would bring this conflict to an end. She says that [Conrad] is not exposed to conflict when he is being home-schooled in either household as the other parent is not present. It was suggested that [Conrad] attending mainstream schooling would make no difference to his exposure to conflict generally.

[87] Finally, [Ms Crespo] says that if [Conrad]'s views, as they are recorded, are not honoured, that will not reduce [Conrad]'s perception of conflict. I am told, "*It can be safely assumed that [Conrad]'s experience of that decision will be to know that his mother's perceptions are wrong in the Court's eyes, his father's perceptions, beliefs and desires are right in the Court's eyes and his view were not given weight.*" I am told that interpretation, if indeed that is [Conrad]'s interpretation, would not be in [Conrad]'s welfare and interest.

Analysis

[88] The first concern that I hold is that there was no evidence to suggest that continuing home-schooling [Conrad] for any further period of time will see his educational performance improve in comparison with his peers to a point where he can readily settle into school without being behind. There is a risk that he may fall further behind. I do not know either way.

[89] It does not matter who was or is responsible for the conflict between [Conrad]'s parents. It is real and significant conflict and both parties are continuing to contribute significantly to the conflict. That conflict in my view makes it impracticable for [Conrad] to continue to be home-schooled. His parents have been unable to even agree on an approach or curriculum.

[90] This Court cannot be expected to impose a high level of control over the way [Conrad] is educated in terms of an order [Ms Crespo] appears to suggest. There will be no need for the Court to do that if [Conrad] attends a reputable state school.

[91] I accept without reservation that [Ms Crespo] genuinely holds a fear that he might be bullied or perceived as different, or otherwise disadvantaged if he attends a school at the start of this coming term. However, I am not persuaded that delay will

see any gap closed. I also have no evidence that there is a culture of bullying at either school. I have no doubt that both schools have strong and effective policies and procedures against bullying. No such concerns are raised in either of the ERO reports. In fact, [Conrad] is performing just below his peers and there are no significant learning concerns for him that are not well within the capability of a well-trained teacher to address within a classroom.

[92] In any event, schools and teachers are expert in dealing with children with different abilities. These two schools are well resourced. Generally [Conrad] falls in the average to low range compared with his peers, according to the standardised testing but it is likely that he will quickly catch up. I find in balance of probabilities that it is unlikely that he will be disadvantaged or be left out in any way if he attends school from the start of term 3.

[93] As for the risk that [Conrad] might think that his views are being discounted or that [Mr Hammond] has achieved a victory over [Ms Crespo], to some extent I address that concern below. However, I expect that both parents will do all they can to support [Conrad] in the transition to a state school. They both profess - and I am certain they are genuine - to have his best interests at heart. I am confident that if he is perceived as needing additional help with his education or with transition, it will be provided.

[94] Mr Maclean has offered to deliver news of the decision to [Conrad] and I think it is appropriate that he do that. It is important that [Conrad] understand that this is not something that has been imposed on him by [Ms Crespo] against [Mr Hammond]'s wishes or by [Mr Hammond] against [Ms Crespo]'s wishes. It has been decided because [Ms Crespo] and [Mr Hammond] were unable to reach a specific agreement but they both want what is best for them, as does this Court.

[95] It is a good time for change, given what is happening in our society with COVID 19 and other children entering the school. Most significantly, home schooling [Conrad] has placed him at the very epicentre of the conflict between his parents. He must know that [Ms Crespo] is unhappy with the way [Mr Hammond] is teaching him and vice versa. Attending a mainstream school may well provide a place of sanctuary

for [Conrad], particularly if his parents continue to support him. He will no longer be at the epicentre of the daily conflict between them.

Which School?

[96] Frankly, there is little to choose between [School B] and [School A] in terms of the quality of education or pastoral care that they are likely to provide. I understand that [School B] is a substantially larger school. Both have acceptable ERO reports.

[97] I have to be focused on, “*What is best for the child, not for the parents or either of them,*” as Hinton J said in *Kavanagh* at paragraph 46.

[98] Both schools are geographically close to one or other of the parents’ homes. [School B] is closer to [School C] where [Dion] is being schooled. The [home] [Ms Crespo] lives in was the family home. [Conrad] is well settled in that area. His brothers attended [School A] for a period of time. [Conrad] has a good cohort of friends there. He will know people within the school.

[99] [Mr Hammond] says that he has a “*strong preference*” for [School B]. He says [School B] clearly has the better record with the Ministry of Education as it is on a five year review cycle, whereas [School A] is on a three year review cycle.

[100] However, ERO reports often have a heavy focus on administrative and policy issues. They do not necessarily focus on the quality of the education that the individual children will receive. The reality is that there is likely to be little difference in that aspect between the two schools.

[101] [Mr Hammond] expresses a concern that [Ms Crespo] does not appear to have provided a copy of Mr Grover’s report to [School A]. However, that is a task that [Mr Hammond] himself could undertake. It is also a task that should be undertaken if I make an order that [Conrad] attend that school.

[102] Both schools appear to incorporate te ao Māori principles and te reo well into their curricula. I am told that [School A] also has language nests involving immersion classes of other European languages as well.

[103] Although I am told that the parents previously rejected [School A] and removed their older children from it, it appears that that was only for a relatively short period of time. There appears to be consensus that [School A] has improved over the years.

[104] It was unfortunate that Dr Smith did not consider the merits of [School B], or that Ms Stead did not consider the merits of [School A]. I understand that in Ms Stead's case, that was because at that time [Ms Crespo] had not proposed that [Conrad] attend [School A]. I therefore have to decide this without any helpful expert opinion, but I doubt there would be much difference in their views as to which of these schools is preferable.

[105] Both schools are likely to be in a position to deliver the education that [Conrad] needs and deliver a space that is free from daily conflict for [Conrad].

[106] Ultimately, I am concerned to give some weight to [Conrad]'s perceptions and wishes, even if it appears that [Conrad] is reflecting what [Ms Crespo] wants.

[107] I anticipate that the conflict between the parents will be somewhat reduced if I make a direction [Conrad] attend [School A]. [Ms Crespo] is more likely to support his attendance at that school in a meaningful way. [Mr Hammond] had indicated that he might consider that school as an alternative.

[108] [Mr Hammond] has offered to be responsible for all transport to school when [Conrad] is in his care. If [Mr Hammond] is responsible for delivering [Conrad] to [School A] on the days he is in his care, then he will be seen by [Conrad] to be endorsing something that [Conrad] will know [Ms Crespo] wants. [Conrad] may well perceive that there is a significant reduction in actual conflict between his parents if he is attending the school that he knows [Ms Crespo] wanted him to attend.

[109] In the end, I find on balance of probabilities that it is in [Conrad]'s welfare and best interests that he attend [School A] from the start of term 3, 2020.

Orders

[110] I am going to ask Mr MacLean to prepare orders for sealing. Those orders are to be based on the orders that Judge Manuel made previously, as the parents are unable to agree on any significant variations at this time. They are to include as the following clauses:

- (a) From the start of term 3 in 2020, [Conrad] is to attend [School A] and his home schooling is to come to an end;
- (b) The parents are to provide [School A] with a copy of the report by Mr Grover. They are to consult, to the extent that they are able, and meet with the school to obtain information about how [Conrad]'s transition to [School A] can best be facilitated;
- (c) Changeovers are to be at 3.00 pm with the receiving parent collecting [Conrad] from school when he is at school. If he is not at school, they are to be at 4.00 pm, with [Conrad] to be collected from the driveway of the other parent's home.

[111] If the parents are able to agree on any of the other details that were helpfully set out in the draft that Ms Matheson supplied to the Court, then they can also be incorporated in the order for sealing.

[112] Mr Maclean will consult with the parents before filing that order but it is to be filed on or before 4.00 pm on 13 July 2020.

[113] Mr Maclean is going to visit with [Conrad] as soon as possible, hopefully today, and explain to him the decision and how it was reached. I am confident that both of his parents will assist [Conrad] by reassuring him that the transition to school, in the new term, will be well managed and that they will do everything that they can to address or reduce any anxieties that he has.

Other Directions and Issues

[114] Although it is unrelated to these proceedings, the matter that causes some ongoing conflict between the parties is the unresolved relationship property

proceedings. Mr Cummings helpfully today informs me that his client's PR 1 affidavit and narrative affidavit are likely to be filed within 14 days. I make no direction because I do not have the file before me.

[115] The parties have applied for a two-day hearing on the substantive issues in this case, which are essentially about the duration of [Conrad]'s care by each parent. They believe the matter has gone to central fixtures but that a date has not yet been allocated. However, I am now told by Mr Cummings that his client wants to file a comprehensive affidavit which, as he puts it, "*Brings it all together.*" He claims his client has been disadvantaged because she has not had much opportunity to do that to date. I expressed surprise, given the weight of the box of evidence that I had to carry into Court but nonetheless, I have agreed that Mr Cummings can file that affidavit within 28 days and that Ms Matheson's client may file an affidavit strictly in reply 14 days thereafter.

[116] Both parties need to be aware that there is a risk that because of that direction, this matter may be removed from the ready list. That is not something that I can control.

[117] I do not believe that there is any need for me to give authority for Mr Maclean to continue as Lawyer for the children in the substantive proceedings, as this s 46R application was simply an interlocutory application in proceedings already before the Court. However, for the sake of clarity, Mr Maclean's appointment is to continue until the issues under the Care of Children Act between [Mr Hammond] and [Ms Crespo] are completed. He is thanked for his service to date.

Judge K Muir
Family Court Judge

Date of authentication: 13/07/2020
In an electronic form, authenticated electronically.