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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2019-004-001072
[2021] NZFC 2090

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

Hearing:	21 October 2020
Appearances:	Z Matheson for the Applicant A Malone for the Respondent B MacLean as Lawyer for Child
Judgment:	18 November 2020
Reissued:	9 March 2021

RESERVED JUDGMENT OF JUDGE K MUIR
[DECISION OF 18 NOVEMBER 2020 CORRECTION PURSUANT TO RULE 204 OF THE FAMILY COURT RULES 2002]

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[1] [Dion Hammond] is [14 years] old. His brother [Conrad] is [eight years] old. Although their parents have separated these boys are fortunate in that their parents live in relatively close proximity to each other in Auckland and both boys are able to spend generous amounts of time in the care of each parent. The current interim order sees them spending six nights a fortnight with their father Mr [Hammond], and eight nights a fortnight with their mother Ms [Crespo].

[2] Although their parents separated in March 2019 and although these proceedings were filed in November 2019, their parents have been unable as yet to agree on long term arrangements for [Conrad] and [Dion]'s care. Unfortunately for [Conrad] and [Dion] their parents have become locked into a very contentious dispute which has generated well over 1,500 pages of evidence in its short life.

[3] I am asked to determine five issues today. The first is whether or not an affidavit that has been sworn by [Conrad] and [Dion]'s 21 year old brother [Kieran] in support of his mother's position should be admitted in whole or in part.

[4] The second issue is whether the current interim order which stipulates a 6/8 pattern of shared care should be varied now so that [Conrad] and [Dion] spend seven nights a fortnight in the care of each parent.

[5] The third issue concerns care and contact for holidays and special days. The principal point of difference between the parties is that Mr [Hammond] wants all holidays to be shared equally with the long Christmas holiday to be shared on a 10/10/14/14 pattern where the parents can enjoy longer holidays with the children. Ms [Crespo] wants the existing interim order to continue with the boys sharing term school holidays and Christmas school holidays on a 6/8 split, although she says she is prepared to consider some longer time for the boys to holiday with their father this Christmas.

[6] The fourth issue is that Mr [Hammond] believes the boys should undertake some therapeutic counselling now. He has nominated Ian Lambie, a very experienced and highly regarded psychologist. Ms [Crespo] says that any decisions as to whether

or not [Dion] should receive counselling should await the receipt of a s 133 report and any recommendations of that report writer.

[7] The final issue is whether a s 133 report should be obtained. The parties agree that a report should be obtained although they are unable to agree on the precise brief for the report writer. Mr MacLean who is [Conrad] and [Dion]'s lawyer, is concerned about the delay that is likely to be caused if the report is to be commissioned.

[Kieran]'s Affidavit

[8] [Kieran]'s affidavit was sworn on 30 September 2020. In it he says that he is making the affidavit in support of his mother. He understands that his mother has been previously criticised for filing an affidavit from him which discusses his personal experience of her home schooling. He expresses some views as to the quality of his mother's attention and care when she is parenting him and [Conrad] and [Dion]. He talks about his mother's emotional stability and engaging personality. He talks at some length about the reasons why he says he has been "*unable to have any relationship with (his) father for almost a year*", setting out five incidents of concern which he says led to a breakdown of the relationship, notwithstanding his attempts to maintain the relationship.

[9] He annexes a series of texts that he has received from his father, sometimes several a day, which he says were his father telling him that he should not believe or support his mother or which he says denigrate his mother or her family. He describes an incident that occurred on Father's Day when his mother tried to have some contact with [Kieran]'s paternal grandparents, which evidently was not to his father's liking.

[10] Ms Matheson acting for Mr [Hammond] says that I should not allow this affidavit to be admitted in evidence and should not allow it be read for the following reasons:

(a) It was late and was filed in breach of a timetable direction that I made on 2 July 2020 where Ms [Crespo] was given 28 days to file a comprehensive affidavit and Mr [Hammond] was given 14 days to file

an affidavit strictly in reply. Mr [Hammond] relies on Rule 416Q which prohibits a party, after filing an initial affidavit in support, from filing further affidavit of evidence except as directed by the Judge or with leave of the Judge.

(b) The affidavit is not relevant. It does not directly relate to the welfare and interests of [Dion] and [Conrad], nor does it contain clear evidence that either parent has inappropriately involved the children in the conflict between the parents. In particular, statements of opinion about the boys' ability as a mother are not relevant.

(c) There is better and more direct evidence about allegations concerning matters such as an alleged physical confrontation between Ms [Crespo] and Mr [Hammond].[1]

(d) Mr [Hammond] has consented to the text exchange being admitted and that is all of the information the Court requires in relation to the relevant issue of whether it is Ms [Crespo], or Mr [Hammond] who is inappropriately involving their children in this dispute.

(e) The affidavit from one of [Conrad] and [Dion]'s siblings can only deepen the wounds and conflict within this family. It might well come to [Conrad] and [Dion]'s attention that their brother has taken this step. It might be necessary for Mr [Hammond] to cross examine [Kieran] if the affidavit is filed and that will deepen the divide.

(f) To admit the affidavit would risk needlessly prolonging the hearing. Mr [Hammond] might feel the need to lead evidence in rebuttal from independent witnesses as well as to cross examine [Kieran].

[11] I am concerned that parts of the affidavit are irrelevant or at best, marginally relevant. I agree with Ms Matheson in that regard. I am also concerned about the potential adverse impact on [Conrad] and [Dion]'s welfare and best interests.

[1] There is apparently a sound recording of the incident.

However, the rules and guidelines around admission of evidence are not found principally in the Care of Children Act 2004.

[12] Issues of admissibility of evidence are to be determined applying the rules of law principally found in the Evidence Act 2006 (the Act). As affirmed in *R v Gwaze* the rules of exclusion provided by the Act are binding on Judges.[2] Although their application may raise "*nice questions of judgment*", they do not confer a discretion as to the admissibility of evidence. They prescribe standards to be observed.

[13] Section 12A of the Family Courts Act gives the Family Court a discretion to admit any evidence that it considers may assist in the determination of proceedings despite that evidence being inadmissible under the Act. However, despite the provisions of s 12A it is inconceivable that a Family Court could consider that irrelevant evidence would assist it in determining a proceeding or any issue in the proceedings. Relevance is always the primary issue.

[14] I also need to bear in mind Rule 3 of the Family Court Rules 2002 which emphasises the need to deal with proceedings as fairly, expensively, simply and speedily as is consistent with justice so as to avoid unnecessary formality and in harmony with the purpose and spirit of the Family Law Acts under which the proceedings arise.

[15] The starting point is s 7 of the Evidence Act which stipulates that all relevant evidence is admissible unless it is inadmissible, or excluded under the Evidence Act or any other Act. Section 7 also provides that evidence that is not relevant is not admissible. Relevant evidence has a tendency to prove or disprove something that is of consequence to the determination of the proceedings.

[16] Section 8 of the Evidence Act requires me to exclude evidence if its probative value is outweighed by a risk that it will have an unfair prejudicial effect on the proceeding or if it will needlessly prolong the proceeding.

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[2] *R v Gwaze* [2010] NZSC 52 at 49.

[17] The "relevance" test in s 7(3) is not particularly exacting. Any evidence that has a tendency to prove a matter or disprove a matter which is material to the determination of the proceeding will cross that threshold.[3]

[18] In the Family Court context as Judge Murfitt pointed out in *D v O*:[4]

> Relaxation of the rules of evidence is not a licence for evidential anarchy. While hearsay evidence and opinion evidence may be times be admitted under the relaxed evidential rules, the touchstone will always be relevance and reliability.

[19] As McGechan J said in *Donovan v Graham*:[5]

> It is important affidavits will not be allowed to mushroom, with irrelevance piled upon irrelevance, accusation upon accusation and with the parties becoming increasingly and unproductively inflamed.

Analysis

[20] There are parts of [Kieran]'s evidence that are relevant. Because of that my concern that the admission of the affidavit might inflame already smouldering matters within this family does not override Ms [Crespo]'s right to lead the evidence, unless I find that admission of the evidence might needlessly prolong the proceedings or hearing or it is otherwise inadmissible.

[21] Those parts that are irrelevant should not be read and I will make a ruling on the relevant passages below.

[22] I am concerned about the possibility of unnecessary delay or needless increase in hearing time. Extensive delays or an extensive increase in hearing time are more likely if Mr [Hammond] thinks it is appropriate to lead evidence to contradict his son or if he chose to cross examine his son. Given that he has expressed concern that the admission of the affidavit might inflame this delicate family matter, and given that he has expressed concern about the welfare and best interests of [Kieran] as well as [Conrad] and [Dion] he might choose instead to show restraint. This is not a situation

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[3] *Wi v R* [2009] NZSC 121.
[4] *D v O* [2006] NZFLR 137.
[5] *Donovan v Graham* (1991) 4 PRNZ 311.

where it would be appropriate for the hearing Judge to rigorously apply the rule of *Browne v Dunn* and find that something that [Kieran] had said should hold the day purely because father has not cross examined him on the issue.[6]

[23] I am conscious of the provisions of Rule 416Q of the Family Court Rules. Delay through the expansion of evidence should be avoided. However, both parents are advocating for a s 133 report being obtained. [Kieran]'s evidence has now been sworn and is provisionally before the Court. In the event that father believes that he has to respond to it, the preparation and filing of a response should not occupy much time.

[24] There is a relevant purpose to [Kieran]'s affidavit. Father has said that [Kieran] is estranged from him and essentially the case that that is because of alienating conduct on mother's part and inappropriate involvement of [Kieran] in conflict between the adults. The texts that are attached to [Kieran]'s affidavit in particular, indicate that conduct of that type at the least might not be "one-way traffic". The specific incidents that [Kieran] addresses are incidents that are addressed in father's affidavit which [Kieran] says he has specifically witnessed, where his mother is painted as an aggressor, or at fault, or in a bad light and where [Kieran]'s account seeks to instead apportion the blame to father.

[25] While many of those incidents may be of marginal relevance to a determination of how [Conrad] and [Dion]'s best interests and welfare can be promoted through care orders, it was Mr [Hammond] who opened the gate by leading evidence of that kind in the first place and I do not feel compelled to slam it shut on Ms [Crespo] through prohibiting [Kieran]'s evidence.

[26] I turn now to the specific paragraphs in [Kieran]'s affidavit:

(a) Paragraph 5 and all of paragraph 6 except the last sentence will not be read and are struck out. [Kieran]'s opinion as to the quality of his mother's parenting is not relevant, helpful and not particularly reliable. [Kieran] is not an independent expert witness.

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[6] *Browne v Dunn* (1893) 6 R 67 HC – codified in s 92(1) of the Evidence Act 2006.

(b) Paragraph 7 falls into the same category.

(c) The individual details that are set out in 8(a), (b), (c) and (d) about confrontations between Mr [Hammond] and Ms [Crespo] are relevant and while it is unfortunate that [Kieran]'s evidence may lead to a risk of him being cross examined on those incidents I am not persuaded they should be excluded.

(d) Paragraph 8(e) causes me concern because it raises an irrelevant issue that unfortunately features throughout the affidavit evidence, namely Mr [Hammond]'s relationship which contributed to the breakdown of his relationship with Ms [Crespo]. However, it is part of [Kieran]'s explanation for why he is estranged from his father and for why he believes that estrangement is not a result of "alienation" on his mother's part and it may remain.

(e) Paragraphs 9 to 11 are relevant as they discuss and annex the texts that his father had sent.

(f) Paragraphs 12 and 13 are irrelevant. The dispute that arose out of Ms [Crespo]'s attempt to meet with the paternal grandparents on Father's Day does not seem to directly impact on [Conrad] and [Dion]'s welfare and best interests.

(g) The second sentence in paragraph 14 will not be read as it is more opinion from [Kieran] about the quality of his mother's parenting.

(h) Paragraph 15 is relevant save for the last sentence which is not evidence and should not be read.

[27] Those passages I have ruled irrelevant or otherwise inadmissible will not be read, they are struck out. In any bundle prepared for hearing the affidavit should be redacted accordingly. The balance of the affidavit may remain on the file.

[28] It is a matter for Mr [Hammond]'s discretion if he files any reply but if he intends to do so he must do that before 2 December 2020 and the affidavit must be confined to matters strictly in reply.

Interim Care Issues – A 6/8 or 7/7 Care Pattern?

[29] On 28 January 2019 Judge Manuel made the current order for the interim care of [Dion] and [Conrad]. She recorded that at the end of a directions conference she invited the parties to agree on interim care arrangements and although they were unable to do so, she had read submissions from each party about the merits of their proposal and heard brief submissions from the parties' lawyers and the children's lawyer. She considered the relevant provisions in ss 4, 5 and 6 of the Care of Children Act 2004. She was confident that the proposals put forward by Mr [Hammond] and by Ms [Crespo] were both broadly in accordance with the children's views and best interests. She directed that interim parenting orders be made in terms of the proposal put forward by Ms [Crespo] because it involved fewer changeovers for the boys minimising conflict between parents.

[30] Mr [Hammond] says that his interim application was not set down for a hearing that day. The parties were given approximately five minutes each to handwrite a memorandum of their proposal and that father only intended to offer his proposal for a short period until 21 April 2020 when the matter was due to return to the Court. He says his proposal was of "*simply on the basis of moving gradually from an even more restricted regime* …". He says the fact that it was intended to be for a short duration is supported by the fact that it does not address matters such as birthdays, Christmas or other special days.

[31] His key contention is that there is no sound reason why care should not be shared equally on an ongoing interim basis and there are good reasons why it should be. Ultimately, he says a 7/7 arrangement would better serve the interests of the children.

[32] Some of Mr [Hammond]'s arguments might have merit if this were the substantive hearing for final parenting orders.

[33] However, interim orders were made earlier this year. There is nothing in Judge Manuel's decision to indicate they were only intended to remain in force for three months as Mr [Hammond] claims.

[34] In *K v K* [Custody][7] Keane J observed that interim orders are usually made where there is a state of sudden volatility and that the jurisdiction to make such orders is to be exercised conservatively "*... and most explicably to counter a particular risk*". Keane J emphasised the importance of the preservation of the status quo unless the welfare of the child is "*distinctly put at risk*". Is there "*… a distinct need to be answered to safeguard and preferably promote the child's wellbeing which simply cannot be postponed*?"[8]

[35] Unless there is consent, interim orders ought to be made sparingly. A determination of the substantive issues between these parties may be some time off as this matter is yet to be set down for a hearing. To make a second interim order and risk further change in the boys' lives on making a final order is likely to be contrary to the best interests of [Dion] and [Conrad] who are entitled, by virtue of s 5(d) of the Care of Children Act 2004, to have continuity in their care, development and upbringing where that is possible. There are no other relevant principles in s 5 that I find are of particular significance here.

[36] There is nothing in the evidence to tell me that a 7/7 per fortnight pattern of care is essential or would better promote [Conrad] and [Dion]'s welfare and best interests construing that issue broadly to encompass the physical, mental and moral needs of the children.[9] I do not need to resolve the issue of whether or not the boys, [Conrad] in particular, have missed too many school days when in their mother's care as I cannot see that one additional day per fortnight will significantly affect that issue. It goes without saying though, that attendance at school is not optional and both parents need to focus on ensuring the boys are in school unless they are unwell.

The Children's Views

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[7] *K v K* [2009] NZFLR 241.
[8] *Fletcher v McMillan* [1996] NZFLR 302, per Hammond J 304 at [39].
[9] *Fletcher v McMillan*, n 8 at 304.

[37] [Conrad] told Lawyer for Child on 15 October 2020 that he would prefer to spend an extra night each week with his mother during term time, including some time with his mother without [Dion] being present. He said: "*I'd like it exactly the same as it was before*" referring to a time when he had nine days a fortnight with his mother and five days with his father. He also said he would like to have phone contact with his mother every third day. [Conrad] said that he had talked to his mother about spending one more night with his mother and she thought that would be a good idea too.

[38] [Dion] was relaxed about the current arrangements which worked well enough for him and had no suggestions about improvements or alterations. Mr MacLean noted that [Dion] is nearly 15 years old and has clearly managed to deal with any parenting issues which in any event, do not affect him to any significant extent.

[39] While I am required to take [Conrad] and [Dion]'s views into account, I am not bound to give effect to them. I must do what is in their welfare and best interests. I note that [Conrad] is not yet nine years old. He is clearly an empathetic boy and it appears from Mr MacLean's latest report that [Conrad] is somewhat aligned with his mother's wishes and concerns and anxious to ensure she is supported. That is commendable and understandable.

[40] Ultimately it is clearly in [Dion] and [Conrad]'s best interests if ongoing conflict and arguments between their parents are discouraged. I note there is generally a prohibition against new Care of Children Act proceedings being filed within two years of substantive orders without leave. There are good reasons for that. Parents should not be encouraged to relitigate issues without good cause. There is no good reason to revisit Judge Manuel's order of 28 January 2020 as far as the fortnightly pattern of care is concerned. This aspect of the application for interim parenting orders is accordingly dismissed.

Interim Care Issues – Holidays and Special Days

[41] Mr [Hammond] argues that there is no reason why school holidays should not be shared equally. He proposes sharing the Christmas school holidays in blocks so

that each parent can take the children away. He is also concerned about the current lack of provision in the current interim orders for special days such as Christmas Days or birthdays.

[42] Ms [Crespo] says that she is not opposed to Mr [Hammond] having the children for a single extended period of time over the course of the Christmas holidays to take the children away. However, she has not committed herself to any particular pattern of care over the Christmas school holidays.

[43] Mr [Hammond] has put forward a detailed proposal which includes the times the children should be with him on Christmas Day. Specifically, he wants to have [Conrad] and [Dion] in his care on Christmas morning. Ms [Crespo] on the other hand, believes it is important that [Conrad], in particular, have the opportunity to spend this Christmas with her. She believes it is the last Christmas that he will believe in Santa Claus and she says that a belief in Santa Claus is encouraged in her house and discouraged in Mr [Hammond]'s house, a claim Mr [Hammond] denies.

[44] I am concerned at the delay that is likely to occur before there is a final hearing in this matter, given the volume of evidence that the parties have put forward and given that they are both promoting obtaining a s 133 report which will cause significant further delays.

[45] It cannot be said that Judge Manuel's interim order for 6/8 fortnightly split represents the status quo as far as the care of [Conrad] and [Dion] over the Christmas holiday period is concerned. I accept that order did not address or contemplate the care pattern 11 months into the future.

[46] I do consider that it is in their welfare and best interest that they have an opportunity to spend more significant time during the summer school holiday and term school holiday period with each of their parents. There is a distinct need to be met here. While I find there is no reason to otherwise disturb Judge Manuel's interim orders it is appropriate that additional conditions and terms now be introduced which deal with the summer term holidays and other special days. This can be done without unduly disturbing the status quo or the children's sense of equilibrium.

[47] The current 6/8 split allows sufficient time for the boys with each of their parents during the term school holidays.

[48] I therefore make an order varying the interim parenting order so as to include the provisions in paragraph 6(b) and (c) of the draft orders attached to Mr [Hammond]'s on-notice application dated 28 September 2020.

[49] I accept Ms [Crespo]' proposal that [Conrad] and [Dion] be in her care on Christmas Eve and Christmas Day this year as being in [Dion] and [Conrad]'s best interests. I also accept Mr [Hammond]'s proposal as to timing of changeovers. In odd numbered years the children are to be in the care of their father from 11am Christmas Eve until 11am Christmas Day and in the care of their mother from 11am Christmas Day until 11am Boxing Day and vice versa in even numbered years.

[50] I accept Mr [Hammond]'s proposals as to special days as set out in paragraphs 8, 9, 10 and 11 of the draft orders attached to his application.

[51] The balance of the matters contained in the draft orders attached to Mr [Hammond]'s application cannot be objected to, save they are more detailed than one would expect in an interim order. Nonetheless given the high level of conflict between these parents it will serve the welfare and best interests of [Conrad] and [Dion] better if there are detailed interim orders in place. Paragraphs 12 to 26 are also to be incorporated into the interim order.

[52] I direct that Mr MacLean is to file a draft order incorporating these changes by 2 December 2020 after consultation with the parties.

Therapeutic Counselling

[53] Mr [Hammond] sought an interim guardianship order that the children be permitted to have independent psychological counselling support with a practitioner such as Professor Ian Lambie. He submitted that there continued to be significant conflict involving the children and communication counselling ordered had done little to lessen it. He said that there were signs that the ongoing conflict was negatively

affecting both children. (inaudible) claimed of loss of report with lawyer for the child, poor attendance by [Dion] and [Conrad] at their schools when in their mother's care and concerning behaviour by [Dion] at school.

[54] Ms [Crespo] is opposed to therapeutic counselling being provided for [Conrad] and [Dion] now. She prefers to be guided by the recommendations of the court appointed psychologist in terms of any support to be provided for the children. She says that Mr MacLean's latest report indicates that there is sufficient rapport between the boys and their lawyer. It is submitted that [Dion]'s behaviour is not highly unusual or highly concerning and it is being adequately addressed by the school which is resourced with onsite counsellors for their students' pastoral care. She is concerned that therapeutic intervention at this stage might potentially colour and raise for questioning the extent to which the court appointed psychologist's findings and interviews with [Conrad] and [Dion] were influenced by that therapy.

[55] Finally, it is submitted that embarking on a course of therapy now for the children may only serve to undermine the efficacy of any therapeutic intervention recommended by the court appointed psychologist. Steps taken now may even be contrary to that recommendation.

[56] Mr MacLean spoke with [Dion] and [Conrad] about the prospect of counselling. [Dion] would like to attend counselling. [Conrad] does not want to and as Mr MacLean notes, that is consistent with their individual circumstances. I note that [Conrad]'s wishes, once again align with those of his mother. More importantly, despite Mr MacLean's observation that [Dion] has managed to deal with any parenting issues with little effect on him personally, there is a prospect that as a 15 year old he is more attuned to his personal emotional needs. I note that in the submissions filed by Ms [Crespo], emphasis was placed on the fact that [Dion] at nearly 15 years was of sufficient maturity and intelligence to have a view on the application. As Mr Cummings rightly observed, if [Dion] did not wish to actively participate in therapy it would have been unlikely to have any benefit and might indeed be detrimental to his wellbeing.

[57] Both parents believe that it is essential that a s 133 report be obtained in this case. That indicates that they each in their own way and for different reasons, believe there are underlying psychological dynamics at play for these children or that aspects of the post-separation parenting is having a psychological impact of some kind on the children. If that were not the case the Court would not need the input of an expert psychologist. Ms [Crespo] submits that only a psychologist adept in determining the reasons behind the children's expressed views would be able to provide the Court with the information required to enable the children's wishes to be weighed about the guiding principles in s 5 of the Act to determine the best long term care arrangements.

[58] It is a concern to me that these children have had a lot of professionals involved in their lives already. Three psychologists were involved in giving evidence for the last hearing. However, none of those psychologists have attempted to engage in any therapeutic counselling or indeed to ascertain whether or not therapeutic counselling is necessary.

[59] I am very conscious of the high level of conflict between the parents and of the fact that all of their children have been involved in that conflict. The evidence [Kieran] gives and the fact that he has asked to give evidence provides sufficient support for that prospect in itself.

[60] I accept that it would be inappropriate for the psychologist Ian Lambie to be involved, typically because mother objects on the basis that he had a brief involvement in counselling father (although I note he was also extensively involved in counselling for the two older boys at some point in their lives).

[61] It will be many months at best and possibly over a year before proceedings are finally resolved. In those circumstances it is important that the boys have the opportunity to engage in therapy or confide in someone who will not be "gathering evidence" for the purposes of this inter-parental conflict. It is better if that person is an expert. I will therefore make a direction which I will detail at the end of this decision that Mr MacLean identify a suitably qualified psychologist – perhaps after consultation with Dr Ian Lambie, who may have a recommendation to make – I agree that psychologist should be available for both [Conrad] and [Dion]. [Conrad] in

particular should attend at least two sessions with the psychologist initially. The psychologist can report to Mr MacLean alone on the issue of whether or not more sessions with [Conrad] are likely to be beneficial. It seems clear that [Dion] will voluntarily submit to the process.

Section 133 Report

[62] Mr MacLean shared the initial reservations that I held about ordering a report under s 133 in this case. I had already decided in May of this year that the delay that would cause was not justified. The view that I had of this file at that time was that the principal problem was the inability of Mr [Hammond] and Ms [Crespo] to communicate constructively and to manage their inter-parental conflict. That is still the principal dynamic that is driving this case.

[63] Currently there is a shared care arrangement in place which sees the children spend close to equal time with both of their parents. That has been in place for a significant period of time. The evidence that is on file leads me to conclude on the balance of probabilities that the current arrangement is not causing the boys significant harm, although of course the ongoing conflict between their parents may cause them harm over time and that conflict is likely to continue as long as these proceedings do.

[64] It is possible that if I order a report under s 133 the report writer might conclude that there needs to be a significant change or a move away from shared parenting in this case. However, such a conclusion is relatively unlikely. This case has few, if any, of the hallmarks of those rare cases where the Courts ultimately find the role of one or the other parent in the lives of the children in question needs to be significantly limited or controlled. In other words, there is a real prospect that the final orders that are made in this case will see a parenting arrangement in place for the long term which resembles the current parenting arrangement.

[65] As for the boys' views, I had directed Mr MacLean to ascertain whether they had any strong views in relation to the s 133 report. While his brief email in reply principally addressed the issue of therapeutic counselling it does not appear that the

boys have any strong views. I am confident that he would have reported any that were held.

[66] I note that under s 133(6) I can only request a written psychological report if I am satisfied the information is essential for the proper disposition of the application that the psychological report is the best source of the information, that the proceedings will not be unduly delayed and any delay will not have an unacceptable effect on the child. The psychological report is certainly not being requested in order to ascertain the children's wishes. Mr MacLean is adequately discharging his responsibilities in that regard. There will be some delay and in many cases the delay might be described as undue.

[67] In the Auckland Registry there is a "queue" of up to a few months before a report writer is even appointed. Both parents understand that the s 133 report might delay matters for up to a year. As I have said, the current parenting dynamic is adequate and with the availability of therapeutic counselling I do not consider that there will be an unacceptable effect on the children.

[68] Mr [Hammond] submits that the high level of conflict and complex allegations and counter-allegations mean that it will be difficult for the Court to resolve these issues at hearing, even through cross-examination. This is based on an allegation that [Conrad] is inappropriately involved in his mother's views of the proceedings. It is said there is a contrast between the mother's description of the dynamics in her home and those reported recently by [Conrad].

[69] Ms [Crespo] similarly seems to subscribe to the view that a psychologist will assist the Court in accepting her contention that she is not a "destabilising" influence on the children and that the children's views and wishes should be respected by the Court.

[70] I am persuaded by those submissions that the information a psychologist might provide is essential for proper disposition and is the best source for that information.

Orders and Directions

1. Mr MacLean is to prepare for sealing an amended parenting order which records the changes that I have set out in paragraphs [48] to [51] above and is to file that draft order after consultation with the parties by 30 November 2020.

2. Mr MacLean is to report by 2 December 2020 as to a recommended therapeutic counsellor. If there are a range of available counsellors, he should consult with Mr [Hammond] and Ms [Crespo]. The matter can be referred to me in Chambers if there is any dispute.

3. The therapist appointed is to have at least two sessions with each of the boys and time with each of the parents if that is considered helpful by them. They can then consult with Mr MacLean over whether continuing therapeutic counselling is desirable and if so, the form and predicted duration. Again, if the parents are unable to agree the matter can be referred to me in Chambers for determination. They may be provided with the pleadings on this file including this decision and my earlier decisions.

4. Mr MacLean had reported that he was in the process of consulting over the draft brief for the s 133 report writer. He is to complete that consultation before 30 November 2020 and provide the draft brief to me in Chambers for approval. If the brief is agreed by all parties and by Mr MacLean then the appointment can be made on the basis of the brief that Mr MacLean submits without need for further judicial input.

5. This matter is to come back for review in a case management conference in late March 2021. The parties are to file memoranda seven days prior to that conference to any procedural directions that are sought.

6. Mr MacLean has leave to apply on 48 hours notice if there are any issues of concern. It should not be necessary for either Mr [Hammond] or Ms [Crespo] to bring any further applications within that time. If they

have matters of genuine concern they can raise them with Mr MacLean and he can determine whether or not Court intervention is required.

Signed at Auckland this 9th day of March 2021 at am / pm

K Muir
Family Court Judge