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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2019-004-001072
[2021] NZFC 4397

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

Hearing:	6 May 2021
Appearances:	Applicant is Self Represented A Malone and S Cummings for the Respondent M Locke as Lawyer for Child
Judgment:	27 May 2021

RESERVED JUDGMENT OF JUDGE K MUIR

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[1] [Mr Hammond] and [Ms Crespo] are the parents of [Conrad] who is nine years old, and [Dion] who is 15 years. Proceedings under the Care of Children Act 2004 have been before this Court for approximately 18 months. Already in that time over 2,000 pages of affidavit evidence and pleadings have been generated.

Issues

[2] [Mr Hammond] now seeks leave under s 143 of the Care of Children Act to appeal aspects of the decision I issued on 18 November 2020 following an interlocutory hearing in October 2020.

[3] He firstly seeks to appeal my decision to allow an affidavit [Ms Crespo] had filed, from their then 21 year-old son [Kieran], to remain on the Court file, albeit redacted in accordance with the orders I made.

[4] He also seeks leave to appeal my decision to decline some aspects of an application for a further interim parenting order that he had made. He specifically challenges my decision to refuse to increase his care of the children from six nights every fortnight to seven nights every fortnight, or alternatively to increase his care of the children during the school term holidays, so that he had care of the children for "exactly 50 percent" of each school term holiday.

[5] Because both of my decisions were interlocutory decisions [Mr Hammond] requires leave of the Family Court to appeal.[1] He does not have to persuade me that my decision or any aspect of my decision was wrong, although if leave to appeal is granted the High Court will need to be satisfied that a material part of my decision was wrong in order for the appeal to be successful.

"Gatekeeping"

[6] The requirement for leave to be sought before an appeal is granted has been described as a "gate keeping" function in a number of cases. The policy reasons

[1] Section 143, Care of Children Act 2004.

behind the requirement for leave were described by Fogarty J in *BLH v MNL* as follows:[2]

> [25] There are obvious policy reasons for Parliament preventing satellite litigation; appeals to the High Court in the course of the Family Court resolving the issues in a set of proceedings. The goal of this litigation in the Family Court is for the Court to settle the shared parenting of this child because the parents themselves cannot agree. I think the restraints on appeals in each of the Domestic Violence Act 1995, Care of Children Act 2004, and Family Proceedings Act 1980 are intended to ensure that the whole process is completed in the Family Court before there is a right of appeal.

[7] In *T v E* it was emphasised that:[3]

> The policy reason behind this section is to prevent proceedings in the Family Court being unduly protracted. If there was an automatic right to appeal of interim decisions, then a person who had greater resources or wanted to use tactical procedures could appeal such decisions, and with the normal time frames that would pass before the appeal is to be dealt with, could make any particular case unduly protracted. Parliament considers the better course of action is to have the case concluded and then when a final order is made that can be the subject of an appeal. The High Court can reverse the decision if it is satisfied that the appeal has merit. Also, the Family Court is a specialist Court and deals with the issues arising in this case on a daily basis.

[8] The issues to be considered on an application for leave to appeal were best summarised by Ellis J in *Malone v Auckland Family Court* as including:[4]

> (a) The welfare of the child, which is the first and paramount consideration: s 4(1);
>
> (b) The interests of justice including the interest in the finality of litigation;
>
> (c) The nature of the interlocutory order in respect of which leave to appeal is sought and, in particular, whether it was procedural only and what effect it is likely to have on the ultimate outcome of the case;
>
> (d) The nature and importance of the proceedings generally, whether from the point of view of legal principle or importance to the parties;
>
> (e) The importance of the proceedings to the child and any prejudice likely to be suffered by the child as a result of the grant or refusal of leave: and

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[2] *BLH v MNL* [2014] NZHC 194 at [25].
[3] *T v E* FC Auckland FAM-2007-004-2481, 2 July 2008 at [4].
[4] *Malone v Auckland Family Court* [2014] NZHC 1290 at [29].

(f) The effect on the child and on the other party of any delay resulting from the granting of leave to appeal and hearing of the subsequent appeal.

Care Pattern – 7/7 – Term Holidays

[9] [Mr Hammond]'s first point was that I was wrong to place reliance on the decision of Judge Manuel dated 28 January 2020, or I was wrong to regard it as an interim order or a subsisting interim order.

[10] He submitted that the decision was ultra vires because it was made in the course of a directions conference. However, he has not appealed that decision, nor has he sought to have it reheard.

[11] Rule 175D(1) of the Family Court Rules specifically permits a Judge to make any orders or directions a Judge is empowered to make by "the Family Law Act under which the proceedings arise" in a directions conference. Section 49 of the Care of Children Act allows an interim parenting order to be made at any time before a parenting order is finally determined as follows:

49 Interim parenting orders

(1) At any time before an application for a parenting order is finally determined in a court, a Judge may make an interim parenting order that has effect until—

(a) a specified date; or

(b) a specified event; or

(c) it is replaced by—

(i) another interim order; or

(ii) a final order.

(2) However, a Judge must not make an interim order unless the Judge is satisfied that an interim order serves the welfare and best interests of the child better than a final order.

[12] In her decision Judge Manuel addressed the paramountcy of the welfare and best interests of the children stipulated in s 4 of the Act. She addressed each of the six principles in s 5 of the Act and addressed s 6 of the Act. There is no doubt that the order she made was intended to be, and was, an interim parenting order.

[13] [Mr Hammond] said in making that order Her Honour relied on a proposal that [Mr Hammond] had put forward. [Mr Hammond] submitted his written proposal was only intended to apply until 21 April 2020, which was the next hearing of the matter. However, the hearing on that date had been set down to determine the s 46R guardianship issue of the schools the children should attend, not to address other interim parenting issues.

[14] It is clear that Judge Manuel was not merely adopting [Mr Hammond]'s proposals. She instead considered that interim contact on an 8/6 fortnightly pattern would be in the welfare and best interest of the children, among other reasons because it involved fewer changeovers for the boys and would minimise contact and hence the potential for conflict between their parents.

[15] In my judgment I referred to *K v K* (custody)[5] which rightly emphasises the need for the power to make interim orders to be exercise conservatively "and most explicitly to counter a particular risk". There was and is no clear evidence that a 7/7 per fortnight pattern of care will better promote [Conrad] and [Dion]'s interests.

[16] In submissions [Mr Hammond] indicated that if leave to appeal was granted, he might seek to lead additional evidence as to incidents have occurred since the orders were made.[6] There have been incidents of concern in the father's household involving [Dion] and one of the young daughters of father's new partner, among other issues. [Dion] is currently receiving therapeutic intervention by consent.

[17] To make a further interim order increasing the time the children spend with their father based on concerns of that kind, without the benefit of the information that the Family Court will have when this matter comes to a substantive hearing, might well be seen as risky. Relatively minor changes from a 6/8 to a 7/7 fortnightly pattern of care, or requiring exactly equal school term holiday contact, are not obvious solutions to the issues that the children might currently be experiencing. The parties are awaiting a s 133 report for good reason. This court will need relevant expert

[5] *K v K* [2019] NZFLR 241, Kearn J.
[6] It is possibly also his intention to lead evidence that [Dion] was not "relatively untroubled by the parental conflict" and that the current arrangements (as at the date of the interim hearing) were not working well enough for him.

evidence if it is to conclude that a change in the pattern of care for the children is in their best interests.

[18] The most cogent issue that [Mr Hammond] raised with the interim care decision was an apparent inconsistency in paragraph [46] where I noted:

> 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 holidays and term school holiday period with each of their parents. …

[19] [Mr Hammond] submits that it therefore ought to have followed that I extended the time that the boys had with him during the school term holidays. He makes the point that while they are generally of a two-week period there are often "add-on days" in the form of teacher only days, public holidays or the like which he evidently considers fall in Ms [Crespo]'s favour meaning his holiday time with the children is shorter than her holiday time with them.

[20] While paragraph [46] might not have been as clearly worded as it could be, the balance of the paragraph makes it clear that I considered the end of year summer holidays and "special days" extensions to contact I was making were sufficient to address the need identified without unduly disturbing the status quo.

[21] However, the point is not whether I consider my decision was correct, nor even whether I consider whether or not [Mr Hammond] might succeed on appeal. My task instead is to apply the guidelines set out in the cases as the "gate keeping" function discussed above, bearing in mind the policy considerations articulated in *T v E* which were approved by Ellis J in *Malone*.[7]

[22] I turn to the six considerations listed at paragraph [29] of *Malone*.

(a) The welfare and interests of the children, in my view, do not favour the granting of leave to appeal on this issue. The most significant issue for these children is the internecine conflict between their parents. Allowing further litigation over care and introducing the prospect of

[7] See note 2.

further change into their lives, which they will know one parent will disapprove of is contrary to their welfare and best interests. There is no cogent evidence that another interim and relatively minor change in their care pattern will promote their welfare and best interests.

(b) As for the interests of justice, including the interest in the finality of litigation, this applies as much to interim orders that are intended to subsist until hearing, as it does to final orders made by this Court. The parties ought not to be encouraged to come back to Court repeatedly, particularly not when the stability and welfare of children are at stake.

(c) As for the nature of the interlocutory order, in this case while the order is not "procedural", it is unlikely to have a significant effect on the ultimate outcome of the case. Whether the pattern of care is 7/7 between now and a final hearing or 6/8, is unlikely to be as influential at hearing as the evidence of the parties and the information provided by the s 133 report writer.

(d) As for the nature and importance of the proceedings, this is clearly very important to [Mr Hammond] or he would not be persisting. [Mr Hammond] spoke with a sense of loss of the inability to build the lasting memories that he thought additional holiday time, or additional time with his boys might provide. I have no evidence that additional day and equal sharing of term school holidays is a matter of significant importance to [Conrad] and [Dion]. Mr Locke has only recently been appointed as lawyer for the children and has not yet had an opportunity to interview them, but in his careful submissions, he emphasises the children's need for their parents to reach sensible agreements regarding their care arrangements, to support each other and to bring the conflict between then to an end as soon as possible. Granting leave to appeal on this would expand their legal conflict and would be antithetical to those needs.

(e) As to the effect on the child or the other party of any delay resulting from the granting of leave, delay is not a significant issue here. Unfortunately, on the date of this hearing these parties were twenty-fourth in line for the appointment of a report writer. There is a significant systemic shortage of resource in this area. It is unlikely that this matter will have a substantive hearing within the next 12 months. The appeal to the High Court could be disposed of within that time without difficulty.

[23] Ultimately, I conclude that leave to appeal on this point ought not be granted taking account of that the analysis above and bearing in mind the policy issues outlined in *T v E*. [Mr Hammond] is an articulate and capable [lawyer] who is representing himself. He is not to be criticised for that but there is no doubt that as a result he is better resourced to continue to engage in interlocutory issues and [Ms Crespo] will ultimately be meeting her own undoubtedly significant legal costs. Further engagement over the pattern of care as an interlocutory issue is not in the children's interests.

Admission of [Kieran]'s Evidence

[24] On this point counsel for the respondent submitted that the decision to refuse evidence in Family Court proceedings is a matter of discretion. She was relying on a decision of *J v P*.[8]

[25] The decision *J v P* is under the Property (Relationships) Act and principally addresses additional discovery. The Judge relied upon a now repealed s 26 of the Property (Relationships) Act 1976, which gave the Court a discretion to receive any evidence it thinks fit whether it is otherwise admissible in a Court or not. There is a similar power in s 12A of the Family Court Act 1980.

12A Evidence

…

[8] *J v P* [2013] NZHC 557 at [9] and rule 158(2).

> (4) The effect of section 5(3) of the Evidence Act 2006 is that that Act applies to the proceeding. However, the court hearing the proceeding may receive any evidence, whether or not admissible under the Evidence Act 2006, that the court considers may assist it to determine the proceeding.

[26] I accept the Court does have a discretion to admit evidence that would not otherwise be admissible provided it is relevant and reliable. But it is not clear that the Court has a discretion to exclude admissible evidence. In *R v Gwaze* the Supreme Court made it clear that the rules of exclusion provided by the Evidence Act 2006 are binding on Judges and do not confer a discretion as to the admissibility of evidence but rather prescribe standards to be observed.[9]

[27] Rule 158 of the Family Court Rules allows a Court to refuse to read an affidavit that unnecessarily sets forth argumentative matter or extracts from documents or which affidavit in reply that introduces new matters. There is no other relevant power in the Family Court Rules to exclude admissible evidence.

[28] There have been cases where evidence from infant children has been excluded in reliance on the paramountcy of the welfare and best interests of the children. Those decisions are understandable when the children are the subject of the proceedings, as the Court is simply exercising its duty to ensure that their welfare and best interests are kept to the forefront. Ultimately, I agree with Judge Somerville in *Brock v Norton*:[10]

> If evidence is relevant and is not excluded as being inadmissible, then it should be received in evidence …

[29] The adversarial approach to litigation in New Zealand allows the parties to select the evidence they consider should be led, and provided it is relevant and is not otherwise excluded under the Rules or the Evidence Act, the parties can lead that evidence even if it might be viewed as unwise in the interests of the family as a whole by a presiding Family Court Judge.

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[9] *R v Gwaze* [2010] NZSC 52 at 49.
[10] *Brock v Norton* [2016] NZSC 468 at [22].

[30] The point of the above is not to examine the merits of the decision I made as to the admission of [Kieran]'s evidence, but rather to identify the fact that this appeal would not, in my view, have been an appeal from the exercise of a discretion as Ms [Crespo] submitted. That was the basis of the decision that I issued on 18 November 2020.

[31] However, [Mr Hammond] has pointed out that I did in fact have a discretion to exercise as to whether to admit [Kieran]'s evidence at all, because the affidavit was being filed outside a timetable that had been set for the filing of evidence. It was in effect two days late, although an application for leave to file it had been made. [Mr Hammond]'s point is that there is an appealable error because had I kept that discretion to the forefront, I may have reached a different conclusion.

[32] As for the "gate keeping" function imposed by s 143 of the Act, applying the six considerations from *Malone*:

(a) I agree that the welfare of the children would indicate that this evidence ought not be admitted at all. Calling [Kieran] as a witness with the prospect of him being cross examined by his father cannot be in [Conrad] and [Dion]'s best interests. I accept given the dynamics of this family they will know about it. It exacerbates the conflict of the parents in these proceedings. On the other hand the welfare and interests of the children tells against allowing further unproductive litigation and hence conflict between their parents.

(b) The interests of justice, including the interests and finality of litigation, do not weigh heavily on either side here.

(c) As for the nature of the order it was procedural in nature, but it is difficult to predict the outcome that order might have on the outcome of the case. A final view on weight to be accorded [Kieran]'s evidence and its place in the matrix of the extensive evidence in this case will only be determined at the hearing.

(d) As for the importance of the proceedings, again the proceedings are important to the parties. [Mr Hammond] is also understandably and rightly concerned to protect [Kieran] and the family as a whole from the impact of his evidence being led. However, there is also a legal issue here which may be of some general importance; does the Family Court have a discretion to exclude otherwise admissible evidence if hearing that evidence is contrary to the welfare and interests of the children?

(e) As for the importance of the proceedings to the children and any prejudice they may suffer, there is a risk that the children will suffer prejudice if I refuse to grant leave because of the impact of [Kieran]'s evidence and any cross-examination of [Kieran] on family unity. The proceedings as a whole are important to [Conrad] and [Dion], and although they ought not to be aware of [Kieran]'s involvement, unfortunately they may now be and this particular issue is of importance to them.

(f) Delay is not a factor here for the reasons given above.

[33] The policy considerations articulated in the passage from *D v E* cited above apply here as well. On this issue though, [Ms Crespo]'s comparative disadvantage in resource for legal squirmishing is not a compelling feature. She can avoid the need for the appeal to proceed on this aspect of my decision by consenting to [Kieran]'s affidavit not being read as part of the evidence. I have already given a preliminary view as to the weight that a Family Court Judge hearing the substantive proceeding might give to [Kieran]'s evidence, and indeed the weight to be given to that part of the evidence of his father which he is responding to. I agree with [Mr Hammond] that it is contrary to the overall interests of this family for [Kieran]'s evidence to be read.[11]

[34] There is a potential legal issue of wider importance as to whether there is a discretion to exclude relevant admissible evidence. It is in the interests of the [Conrad]

[11] Unfortunately, the same can probably be said for much of the rather repetitive and unnecessarily combative material that fills the 2000 odd pages filed to date. No general challenge to admissibility has yet been made and the Court has not an opportunity to review all of it.

and [Dion] that there is certainty as to whether [Kieran]'s evidence must be allowed to remain on the record.

[35] It follows that leave to appeal is granted on the issue of whether [Kieran]'s affidavit ought to be admitted.

Costs

[36] If either party seeks costs following this decision, they should file a memoranda with supporting material within seven days. I will allow a further seven days for any response. Any memoranda should be limited to five pages plus any relevant annexures. I note however, that both parties have achieved some success and that [Mr Hammond], as a self-represented party, is generally not entitled to costs.

Signed at Auckland this 27th day of May 2021 at am / pm

K Muir
Family Court Judge