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

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IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2014-009-000059
[2022] NZFC 5627

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[DARLENE RUSSELL] Applicant
AND	[ALEX GEORGE] Respondent

Hearing:	15 June 2022
Appearances:	A Butler for the Applicant T Scott for the Respondent A Corry as Lawyer for the Children
Judgment:	21 June 2022

RESERVED JUDGMENT OF JUDGE P W SHEARER

The issue

[1] The issue I am asked to determine, and which decision I reserved at the conclusion of a 1¼ hour submissions-only hearing on 15 June, is under s 139A of the Care of Children Act. Specifically, an application by the children's mother for leave to apply to vary a parenting order that was made by consent less than 2 years ago, on 28 April 2021, in relation to the parties' two children.

[2] The issue boils down to whether there has been a material change in the circumstances of the applicant, Ms [Russell], or those of the children.

[3] [Kellie] is almost 13 years old (date of birth: [date deleted] 2009) and [Dan] is now 10½ (date of birth: [date deleted] 2011).

The Law

[4] Section 139A provides:

> **139A Leave required in certain cases to commence substantially similar proceedings**
>
> (1) A proceeding (a **new proceeding**) may not be commenced under section 46R, 48, or 56 without the leave of the court if that new proceeding—
>
> (a) is substantially similar to a proceeding previously filed in the Family Court by any person (a **previous proceeding**); and
>
> (b) is to be commenced less than 2 years after the final direction or order was given in the previous proceeding.
>
> (2) The leave of the court may only be given under subsection (1) if, since the final direction or order was given in the previous proceeding, there has been a material change in the circumstances of—
>
> (a) any party to the previous proceeding:
>
> (b) any child who was the subject of the previous proceeding.
>
> (3) In this section, a new proceeding is **substantially similar** to a previous proceeding if—
>
> (a) the party commencing the new proceeding was a party to the previous proceeding; and
>
> (b) a child who is the subject of the new proceeding was the subject of the previous proceeding; and
>
> (c) the new proceeding—
>
> (i) is commenced under the same provision of this Act as the previous proceeding; or
>
> (ii) is for an order varying the order made in the previous proceeding; or
>
> (iii) is for an order discharging the order made in the previous proceeding.

> (4) This section does not apply if every party to the new proceeding consents to its commencement.

[5] This is a relatively new section, added to the Act with effect from 31 March 2014. As Judge de Jong commented in *Border v Tokoroa:*[1]

> …presumably Parliament felt a need for this kind of filter to guard against parties repeatedly filing unnecessary or unmeritorious applications regarding children.

[6] Judge de Jong went on to say in that case that:

> [36] In my view the phrase "material change" must be read so as to apply to a significant relevant change in the circumstances of a party/child in the context of the Court's need to view the welfare and best interests of the child as the paramount consideration in terms of s 4.

[7] Counsel for the parties also referred in their submissions to the decision of Judge Maude in *Roundtree v Tipsanich* where His Honour accepted a submission that:[2]

> …to qualify as a material change the change proposed must be one that if placed before the Judge who heard the proceedings earlier would have been one that would have likely led the Judge to reach a different conclusion.

Arguments

[8] Ms [Russell] has filed three separate applications to vary the existing parenting order dated 28 April 2021. On 14 June 2021, less than seven weeks after the consent order was granted, Ms [Russell] applied without notice. That application was declined and directed to proceed on notice. She then filed a further without notice application three days after that, on 17 June 2021, which was also directed to proceed on notice.

[9] On 15 November 2021, Mr [George] then filed an on notice interlocutory application for the proceedings filed by Ms [Russell] to be dismissed.

[10] On 5 January 2022, Ms [Russell] filed a further (third) without notice application to vary the parenting order. On this occasion Judge Fleming granted leave on the eDuty platform, although she directed that the application to vary the parenting order was to proceed on notice. Judge Fleming directed the appointment of lawyer for

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[1] *Border v Tokoroa* [2014] NZFC 10947 at [26].
[2] *Roundtree v Tipsanich* [2015] NZFC 5488 at [14].

the children and Ms Corry who had acted for the children in the previous proceedings, was reappointed.

[11] Mr [George] then filed a further interlocutory application pursuant to r 194 of the Family Court Rules on 2 February, asking for Ms [Russell]'s application to be dismissed.

[12] The cross-applications were considered by Judge Duggan at a directions conference on 23 February, who made timetabling directions for this submissions-only hearing to determine the leave and dismissal applications.

Submissions for Ms [Russell]

[13] The written submissions filed by Ms Butler on behalf of Ms [Russell] summarise the matters raised by Ms [Russell] in her affidavits as three separate areas of material change.

[14] Firstly, concerns that have arisen about [Kellie] wanting to be a boy and possible psychological issues. Ms Butler submitted that if this new issue of [Kellie] feeling trapped in the wrong body had been known to the parties in April 2021, and known to Judge Walsh when he approved the consent memorandum, steps would likely have been taken to address it before the making of final orders. Ms Butler submitted this type of emotional distress is exactly the type of material factor contemplated by the discretion in s 139A.

[15] Secondly, Ms Butler submitted that an escalation in the parties' longstanding communication difficulties, as seen in disagreements since the April 2021 order about medical issues for the children, failure to agree upon Ms [Russell]'s holiday time with the children, and failure to attend communication counselling, is also a material change in circumstances.

[16] Thirdly, Ms Butler submitted that a change in Ms [Russell]'s employment and resulting increased availability to care for the children, and also the availability of legal aid now, is a material change in circumstances. Ms Butler explained at the hearing that in April 2021, and for the balance of 2021, Ms [Russell] was running a

[business] that required her to start work at 5 am each morning. Consequently, she could not have the children overnight during the school week, because she was not home in the mornings to get them up and off to school. Hence the reason that the existing parenting order reserves Ms [Russell] care of the children from 3 pm to 7.30 pm only, on Monday, Tuesday and Wednesday of Week 1 and on Monday and Tuesday of Week 2 of a fortnightly cycle.

[17] Ms Butler also submitted that in exercising the discretion pursuant to s 139A, the Court must be mindful of the paramountcy principle in s 4. The welfare and best interests of the children must still be the first and paramount consideration.

Submissions for Mr [George]

[18] Ms Scott filed written submissions on behalf of Mr [George] and, in summary, does not accept that any of the matters raised by Ms [Russell] constitute a material change in circumstances.

[19] Ms Scott submitted that while the specific issue relating to [Kellie]'s gender was not known at the time of the April 2021 order, there were concerns around [Kellie]'s mental health. Ms Scott submitted that the issue of whether or not [Kellie] should receive hormone treatment is a guardianship decision and cannot be resolved by a variation of the parenting order.

[20] Ms Scott also submitted that communication difficulties and ongoing adult conflict is not a change in circumstances. She pointed out that these parties have been in litigation since 2014.

[21] Mr [George] denies that he has failed to comply with the terms of the existing order, and Ms Scott submitted that any failure to comply with the order is more appropriately dealt with by way of an application for admonishment or enforcement, rather than an application for variation.

[22] Ms Scott disputed that there has been a material change in circumstances as a result of Ms [Russell]'s employment. She submitted that Ms [Russell] was self-employed at the time the order was made in April 2021 and is still self-employed now.

[23] She submitted that Ms [Russell] now being in receipt of legal aid is not a material change in circumstances. Ms Scott argued that the current situation, whereby a party has filed multiple applications within the two year period, attempting to relitigate issues that have only recently been resolved, is exactly the type of behaviour that Parliament intended to restrict.

Submissions of Lawyer for the Children

[24] Ms Corry filed an updated report on the morning of the hearing stating:

> 1. I have ascertained the children's views in light of the hearing today about whether leave should be granted for Ms [Russell] to relitigate care and contact.
>
> 2. Both the children told me that they would like to spend more time with their mother.
>
> 3. Both children told me of their father's and his mother's hatred for their mother. They can just tell from what they say and don't say and how they are about her.
>
> 4. Both children tell me that they don't know what their mother thinks about their father because she doesn't tell them.
>
> 5. [Dan] told me that it makes him feel really sad and he would like them to get on and for Dad to be nice to and about Mum.
>
> 6. [Kellie] told me that she just wants to be with Mum 90% of the time and she wishes they could get on. She also believes she is transgender and her father is transphobic.

[25] Ms Corry went on to say:

> 7. I support the application for leave. When the application was resolved by consent last year without the need for a hearing there was an underlying assumption that all issues were resolved and the outcome would work well for the children. Ms [Russell] had also limited her options based on the limitations of her self-employment prior to this and potential plans to move away from Christchurch.

[26] In her oral submissions Ms Corry advised that the children were both very clear that they wanted 50/50 shared care when she saw them in February this year. Ms Corry saw the children again at her office on Monday 13 June and they confirmed, again, that they do not like the current care arrangement.

Reply for Mr [George]

[27] Ms Scott cautioned me about finding a material change in circumstances simply because children express a view about wanting to change a care arrangement. She submitted it would open the flood gates and allow continuous new applications if that was the threshold for granting leave. Ms Scott said the parties knew in April 2021, when the consent memorandum was signed, that the children wanted more time with Ms [Russell] than what was being provided for. She said that the children's views are not a change in circumstances.

Analysis

[28] I understand where Ms Scott and Mr [George] are coming from, in terms of their concern and complaint that Ms [Russell] has filed repeated applications and has sought to relitigate issues that were already before the Court in the previous proceedings, that the parties then resolved by agreement in April 2021. It is clear that there has been a bitter and protracted history to the parties' litigation, and I am conscious that the Court must, therefore, be very slow and cautious to allow further litigation to commence, and particularly inside of the two year embargo that s 139A provides.

[29] My concern, however, is that these two children have experienced the current parenting arrangement for more than 13 months and are now expressing a very clear view to their own lawyer that they don't like it. They want the existing care arrangement to change.

[30] The existing care arrangement is an unusual one, in that:

(a) Whilst the children get to see their mother on three days of Week 1 of the fortnightly cycle, they only see her for 4½ hours on each of the three days, and do not stay a single night.

(b) On Week 2 they have two afternoon visits and stay overnight once only (on the Saturday). As such, a total of one night, only, each fortnight;

(c) In the three school term holidays each year, Ms [Russell] has the children for one block of two weeks only. As such, one-third of these holidays;

(d) In the Christmas school holidays, which are usually about 7 weeks long, Ms [Russell] is permitted one block of 10 days each second year, and the period from [Dan]'s last day of school until Christmas Day in the alternate year. That, again, is significantly less than half of the school holiday.

[31] In my view it would not be child-focused for the Family Court to say to [Kellie] and [Dan] that there is nothing that can be done about the care arrangement until two years from when their parents agreed to the existing order. That would be hard for children of this age to understand. They are not young children who don't or can't have input into the day-to-day care arrangements that affect them.

[32] The overriding principle of the Act is that the welfare and best interests of the children are the first and paramount consideration. I am also obliged by s 4 to consider the particular circumstances of these particular children, and to take into account the principle that decisions affecting children must be made and implemented within their timeframe. Views the children express must also be taken into account. All of those factors, in this particular case, go against a rigid interpretation of s 139A and the suggestion that any review of the parenting order should wait until after 28 April next year.

[33] It may well be that the children were requesting greater time with Ms [Russell] when the parties signed off the consent memorandum in April last year and that this is not, therefore, a new development. However, there is nothing in Judge Walsh's oral judgment of 28 April 2021 to say that he was made aware of that. Rather, it seems that Judge Walsh was presented with a fait accompli, in terms of a consent memorandum that the parties had signed immediately prior to what was otherwise going to be a two day defended hearing, and which consent memorandum the Judge accepted and approved on the papers, without hearing any evidence. That is, of course, standard procedure in those circumstances. It is what the parties and counsel were

asking the Court to do but it is not necessarily what the children wanted the Court (or their parents) to do.

[34] I accept the evidence that Ms [Russell] was running a [business] at that time, in April 2021, and was not then available to have the children stay overnight during the week. That may have been a decision which Ms [Russell] regrets with the benefit of hindsight, but whatever her reasoning at the time, the fact that she is no longer doing that work and that she is now available to have a much greater share of the children's care, is also a material change in circumstances in my view.

[35] I agree with Ms Scott that guardianship issues cannot be resolved by way of further proceedings about the parenting order, and that enforcement issues and/or ongoing adult conflict does not justify an application for leave to file an early variation application.

[36] As Judge Courtney said in *Rupert v Stoppard*[3], "a simple wish on the part of a child would not necessarily be sufficient to grant leave", but both [Kellie] and [Dan] are expressing very clear and consistent views which, I find, are effectively a cry for help. I cannot ignore that.

[37] I have therefore reached the same conclusion as Judge Courtney did in the case I have just referred to:

> 16. Notwithstanding what appears at first blush to be a clear case that s 139A was directed at to prevent repeat hearings, I believe there are issues raised that do need to be investigated from the point of view of the welfare and best interests of the children.

Decision

[38] I therefore grant leave for Ms [Russell] to bring her application to vary the existing parenting order dated 28 April 2021, and allow that application to continue.

[39] It follows that I decline Mr [George]'s interlocutory applications dated 15 November 2021 and 2 February 2022 to dismiss the proceedings.

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[3] *Rupert v Stoppard* [2015] NZFC 5775 at [15].

[40] I make no orders as to costs. Costs are to lie where they fall.

Directions

[41] To progress the application for variation, I make directions as follows:

(a) Ms [Russell] is to file a further affidavit within 14 days of the date of this judgment, setting out the precise variation she is seeking;

(b) Ms Corry's brief is extended to convene an urgent round table meeting upon the filing of Ms [Russell]'s affidavit, to explore the possibility (if any) of settlement. Alternatively, the parties and counsel may be able to explore settlement options by way of correspondence. Ms Corry expressed the view during the hearing that an equal shared care arrangement, either 2/2/5/5 or week-about, would be a suitable and appropriate outcome. With children of this age either outcome would, in my view, be appropriate.

(c) The registrar is to allocate a 30 minute directions conference as soon as time is available. If there is a need for the variation application to proceed to a defended hearing, my view is that it should not be necessary to review and re-litigate historical allegations and grievances. The issue, now, is the appropriate care arrangement going forward, bearing in mind that the Court only has jurisdiction up to the age of 16, which will be well short of the children finishing high school. At the ages they already are, the children's views will clearly be a significant factor and influence for the Court. Given the history of conflict and ill-feeling as between the parties, it would be in the children's best interests to avoid the need for a further Court hearing, if at all possible. I encourage both parents to consider that and compromise accordingly.

Judge P W Shearer
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 21/06/2022