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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2022-004-000170
[2022] NZFC 9861

IN THE MATTER OF	THE STATUS OF CHILDREN ACT 1969
BETWEEN	[VERNON LANE] Applicant
AND	[MIKAYLA LESTER] Respondent
AND	[TISHA BAO] Second Respondent

Hearing:	24 August 2022
Appearances:	B Jones for the Applicant T Homes/K I Starr for the Respondents
Judgment:	7 October 2022

RESERVED JUDGMENT OF JUDGE D A BURNS
[In relation to application to strike out an application for a declaration of paternity and an application for security for costs]

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[1] This case concerns the life of a child called [Robby Lester] born [date deleted] 2007 (15 years). The applicant Mr [Vernon Lane] asserts that he is biological father of the child. The child's biological mother [Mikayla Lester] says that Mr [Lane] is not the father. Ms [Tisha Bao] is Ms [Lester]'s partner and is deemed to be parent of the child due to the application of the Status of Children Act.

[2] The following facts are accepted by the parties:

(a) the first respondent [Mikayla] is the biological mother of [Robby];

(b) [Robby] was conceived as a result of an artificial insemination procedure;

(c) the semen used for the artificial insemination procedure was donated by a man who was not in a relationship with [Mikayla] (the identity of the donor is disputed);

(d) both [Mikayla] and the second respondent [Tisha] were living together in a civil union at the time of [Robby]'s conception; and

(e) [Mikayla] and [Tisha] decided jointly to have a child together and are both [Robby]'s parents.

[3] Those facts are common ground between the parties.

[4] The applicant Mr [Lane] filed proceedings in the Auckland Family Court seeking a declaration of paternity pursuant to s 10(5)(a) Status of Children Act 1969. His application is dated 23 February 2022.

[5] Following service of the application on the respondents a notice of response was filed and supported by affidavit evidence. In addition the respondents brought two interlocutory applications to the Court, namely:

(a) an application to strike out the proceedings;

(b) an application for security of costs in the event that the strike out application was not successful.

[6] The two interlocutory applications were opposed by the applicant. A short cause hearing was set down in the Auckland Family Court to hear and consider the two interlocutory applications. Full written submissions have been filed by the parties and the hearing proceeded by way of submissions only.

[7] There is a large measure of agreement on the factual matters before the Court but there is one significant issue where the parties are apart. The applicant says in summary as follows:

- That he commenced a relationship with his former partner [Griffin Nash] in about 2006.

- [Tisha] and [Griffin] were close friends and he too formed a close relationship with [Mikayla] and [Tisha] over the years.

- That he separated from [Griffin] in around 2012 and subsequently moved to Australia where he continues to reside.

- Since then he has had little contact with [Mikayla], [Tisha] or [Griffin].

- In relation to the child's conception he said when he started his relationship with [Griffin Nash] he also learned that [Mikayla] and [Tisha] wished to have a child (it was agreed between them that [Mikayla] would carry the baby).

- He says that they approached [Griffin Nash] in about 2005 asking him to donate his sperm, which he agreed to do. The applicant says he was supportive of him doing this and he also loved children and thought it would be a wonderful opportunity for him as a gay man to be able to father a child and have a positive influence in the child's life. He saw himself as a support person to everyone concerned.

- Shortly after [Tisha], [Mikayla] and [Griffin] visited a fertility clinic to assist with their artificial insemination. He says all four of them went through the counselling services that were provided by the clinic.

- He said that Mr [Nash] provided sperm samples to the clinic but was told that the chances of [Mikayla] conceiving using [Griffin]'s sperm was very unlikely. I understand this was as a result of having a low sperm count.

- Regardless of this advice from the fertility clinic [Tisha] and [Mikayla] still wanted to continue. They agreed to artificially inseminate [Mikayla] at home using [Griffin]'s sperm without the assistance of the fertility clinic. For approximately two years the respondent unsuccessfully attempted to conceive a child using [Griffin]'s semen. Also, apparently some attempts to conceive through the clinic did occur but were unsuccessful. The applicant says that [Griffin]'s process for obtaining his semen was for the applicant and [Griffin] to have sex and for them to ejaculate at the same time. [Griffin] would ejaculate onto the applicant's stomach and this would then be transferred to a cup and transported to the respondents' house for their use. He goes on to say that as a result of many attempts over a period of time which were unsuccessful that the applicant and Mr [Nash] had sex together. As a result their semen became mixed and the mixed semen was used to inseminate [Mikayla]. The insemination was successful and she became pregnant. The applicant says that this occurred shortly after his semen was used and he believes that he is the child's father. He further says that the child looks like him..

[8] Mr [Nash] in his affidavit disputes the alleged fact of the semen being mixed and says that it did not happen. This is a conflict of fact where the parties are apart. The first and second respondents allege:

(a) they initially asked [Griffin] to donate his semen in 2004. [Griffin] did not agree to begin with. [Griffin] later agreed to donate his sperm;

(b) [Vernon] was pivotal in helping [Griffin] change his mind and agreeing to be their donor;

(c) the parties agreed [Griffin] would donate his sperm;

(d) they wanted [Robby] to know that [Griffin] was the biological father so [Robby] could refer to [Griffin] as his dad if he decided to;

(e) [Griffin]'s sperm was considered low quality and they were told by Fertility Associates that it would be difficult to become pregnant;

(f) they do not recall attending counselling;

(g) the parties attempted intrauterine semination (IUI) through Fertility Associates. This was not successful;

(h) towards the end of 2005 or early 2006 they decided to try an informal process. They agreed that [Griffin] would produce semen at home and put it into a container to transport to them. They then used the semen to inseminate [Mikayla];

(i) they did not know the semen was mixed and put into a container and there was no discussion about mixing samples and they did not think [Vernon] was the donor;

(j) [Mikayla] fell pregnant in 2006 via the informal process;

(k) [Griffin] is a consistent figure in [Robby]'s life. [Robby] understands [Griffin] is his genetic/biological father and calls him "Dad";

(l) [Robby] has a personal relationship with [Griffin], and [Robby] and [Griffin] look similar. [Robby] does not look like [Vernon];

(m) [Robby] knows [Griffin]'s parents as his grandparents;

(n) [Robby] does not know who [Vernon] is.

[9] The applicant says that he strongly is of the view that he is the biological father of the child. Both respondents and Mr [Nash] disagree. There has not been any DNA testing or analysis undertaken up to the date of hearing before me and so the issue of the biological status of the applicant or Mr [Nash] has not been assessed.

[10] The applicant seeks for a DNA test to be undertaken. The respondents refuse to partake in such a process.

[11] Ms Homes in her written and oral submissions has analysed the Status of Children Act. In her written submissions she submits as follows and I set out paragraphs 19-28 of her submissions.

> 19. The purpose of the Act is to remove any uncertainty for children who are conceived 'out of wedlock' and or by an assisted human reproduction procedure (regardless of where, or how that AHR procedure is carried out).
>
> **2A Purpose of sections 3 and 4**
>
> The purpose of sections 3 and 4 is to remove the legal disabilities of children born out of wedlock.
>
> **3 All children of equal status**
>
> (1) For all the purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.
>
> 20. What is meant in the Act by 'status' and 'relationships' was determined by the Supreme Court in *Hemmes v Young*. Mr Young brought an application under s 10 of the Act for a declaration that Mr Hemmes was his natural father. Mr Young had been legally adopted by a Mr Ronald Young. Mr Hemmes sought to strike out/dismiss the proceedings on the ground Mr Young's application could not succeed at law. Having had the lower courts refuse to strike out the proceeding Mr Hemmes appealed to the Supreme Court. The appeal was allowed, with the Court finding that a declaration could not be obtained under s 10 of the Act that the relationship of parent and child existed between a person and his or her biological parent or child. That is, it was held the proceeding should be struck out on the basis that the Court could not in law grant the declaration sought.

21. Central to the decision of the Supreme Court was the determination that:

a. 'status' is a legal concept involving legal relationships and their consequences in law; and

b. 'relationships' as contemplated under the Act are legal relationships not biological.

> [9] The essential purpose of the Act was and is to remove the legal disabilities of children born out of wedlock. The short title to the Act signals that its principal concern is with status, which is a legal concept involving legal relationships and their consequences in law. It is in the context of legal status and removing the disabilities previously attaching to the status of illegitimacy that the reference to the relationship between every person and his mother and father must be understood. The statutory context and purpose, with their focus on status, both clearly suggest that the Act is referring to legal rather than biological relationships. Indeed, the terms of s 3(1) make it perfectly clear that, at least in that section, the word "relationship" must be referring to the legal relationship between the parties. The biological relationship between a person and his father and mother could never have depended on whether the biological parents were married. The biological relationship is an immutable fact in respect of which the marriage or otherwise of the biological parents can make no difference. Hence s 3(1) of the Status of Children Act cannot, contextually or logically, be concerned with biological relationships. The same can be said of the use of the word "relationship" in subss (2) and (3) of s 3.

22. There are numerous legal consequences that flow from determining legal relationships pursuant to the Act. Whether there is a legal parent-child relationship determines what financial support is available to that child and/or any proprietary rights of inheritance (i.e., whether a child can claim an interest in an estate). An administrator is required to make reasonable inquiries to determine whether any person exists who could claim an interest in the estate or property by reason of the Act before making a distribution from any estate or any property held on trust. The legal relationships that result pursuant to the Act may confer citizenship on a person. Furthermore, after a declaration under s 10 the identity of a father is able to be registered on the births register.

Part 2 of the Act

23. Part 2 was originally included via the Status of Children Amendment Act 1987. The 1987 Act made provision for the status of children born using certain artificial reproduction procedures. The new Part 2 only applied to children born of pregnancies to a woman who was living

with a man in a relationship in the nature of marriage. Part 2 was then updated via the Status of Children Amendment Act 2004 to its current form.

Sections 13 & 15

24. Section 13 states that the purpose of Part 2 of the Act is to remove uncertainty about the status of a child who has been conceived via AHR procedures. Section 15 defines what is an AHR procedure:

> 13 The purpose of this Part is to—
>
> (a) remove uncertainty about the status of children conceived as a result of AHR procedures; and
>
> (b) replace the Status of Children Amendment Act 1987 with provisions that continue the effects of that Act (except for the status of father without the rights and liabilities of a father), **but also extend the status of parent to a woman living as a de facto partner of a birth mother**.
>
> 15 **AHR procedure defined**
>
> (1) In this Part, unless the context otherwise requires, AHR procedure means one of the following assisted human reproduction procedures (regardless of where, or how (for example, with whose help) the procedure is carried out):
>
> (a) an artificial insemination procedure:

Sections 14 & 18

25. Sections 14 and 18 of the Act should be read together. Section 18 creates a legal parent-child relationship between the mother's partner and the child. Section 14(2) provides that a woman who is not the birth mother of a child but who, by Part 2 is a parent of the child must, be treated so far as practicable in the same manner as the father of, or as the other parent of, the child.

> **18 When woman's non-donor partner is parent, and non-partner semen donor or ovum donor is not parent**
>
> (1) This section applies to the following situation:
>
> (a) a partnered woman (woman A) becomes pregnant as a result of an AHR procedure:
>
> (b) the semen (or part of the semen) used for the procedure was produced by a man who is not woman A's partner or, as the case requires, the ovum or embryo used for the procedure was produced by, or derived from an ovum

produced by, a woman who is not woman A's partner:

(c) woman A has undergone the procedure with her partner's consent. (2) In that situation, woman A's partner is, for all purposes, a parent of any child of the pregnancy.

14 Interpretation

…

(2) **A woman who is not the birth mother of a child but who, by operation of this Part**, is a parent of the child must, for the purposes of an enactment or rule of law (other than this Part) that refers to, or contemplates, a mother and a father of, or 2 parents of, a child, **be treated so far as practicable in the same manner as the father of, or as the other parent of, the child.**

Section 21

26. Section 21 prevents the creation of a legal parent- child relationship between the donor man and the child.

21 Partnered woman: non-partner semen donor not parent

(1) This section applies to the following situation:

(a) a partnered woman becomes pregnant as a result of an AHR procedure:

(b) the semen (or part of the semen) used for the procedure was produced by a man (man A) who is not her partner.

(2) In that situation, **man A is not, for any purpose, a parent of any child of the pregnancy.**

27. The combined effect of the above statutory provisions was recognised by His Honour Judge Mather in Re G. In that case the Court was asked to determine as application by the female applicant MG for the appointment of her female partner as additional guardian of their child who was conceived by self-insemination of MG with donated sperm.

[12] From these statutory provisions it is apparent that:

- These parties, as (initially) de facto partners and (subsequently) in a civil union, are partners for the purposes of SCA.
- E was conceived by AHR procedure as defined in SCA and accordingly Part II of SCA applies.
- KA, as the partner of E's biological mother MG, is for all purposes a parent of MG's child: s 18(2) of SCA.
- Furthermore as a parent of the child KA must be treated as far as practicable as the father of, or other parent of, E: s 14(2) of SCA.
- The child's biological father is not a parent of E: s 21 of SCA.

Section 26

28. Section 26 of the Act provides that the various presumptions of paternity in the Act prevail over any conflicting evidence of paternity, including the making of a Family Court or High Court declaration of paternity.

[12] Ms Jones seeks to distinguish the leading case relied on by Ms Homes and I set out paragraphs 22-46 of her written submissions:

22. The respondents, in their strike out application, argue there is no reasonable basis for this application because the applicant cannot by law obtain a declaration a relationship of father and son exists between the applicant and [Robby].

23. Counsel submits there is a reasonable basis for the application, the grounds are summarised below:

a. The applicant only needs to allege a relationship of father and son exists between him and [Robby] to be considered an "eligible person" under section 10 of the Status of Children Act 1969 ("the Act").

b. The meaning of relationship in section 10 of the Act was determined *Hemmes v Young* [2005] NZSC 47, in relation to a child of an adoption. Counsel submits this case is distinguishable as *Hemmes v Young* was concerned with an adoption and this matter is concerned with an Assisted Human Reproductive ("AHR") procedure. The two are not the same, adoption has tried and tested legal underpinnings whereas this situation involves a developing area of law that requires further clarification within the context of the current social/political settings.

c. The case ought to be heard to determine a complex area of the law.

d. Counsel submits the application is not so clearly untenable that it cannot possibly succeed. This is an area of law which ought to be tried on its merits.

24. To assist the Court counsel has set out the legal principles applying to the application under section 10 of the Act below.

The Law

Part 1 Status of Children Act 1969

25. The essential purpose of the Act is to remove the legal disabilities of children born out of wedlock.

26. Section 3(1) of the Act provides:

a. For all purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.

27. The Family Court or High Court may make a declaration of paternity if:

a. An eligible person applies to the court for a declaration; and

b. It is proved to the court's satisfaction that the relationship exists.

28. Section 10 of the Act defines an eligible person as a person who alleges that the relationship of father and child exists between the person and another named person.

29. Alleges is not defined in the Act, the meaning of alleges in the context of the Act should be ascertained from its text and in the light of its purpose. The usual meaning of the word "alleges" means "to state something as fact but without giving proof."

Hemmes v Young [2005] NZSC 47

30. The Supreme Court in *Hemmes v Young* considered whether an adopted person can obtain a declaration under s 10 of the Act that the relationship of father and child exists between himself and a man whom he claimed to be his biological father.

31. The applicant, Mr Young, had been adopted as a child, which effectively meant for all purposes, Mr Young ceased to be the child of his biological parents and for all purposes became the child of his adoptive parents.

32. The question the Supreme Court had to consider was, in light of the adoption, whether the Court has power to make the declarations sought. To answer this the Supreme Court had to determine whether the meaning of the "relationship" in the context of s 10 of the Act, is limited to only legal relationships, or if it can include biological relationships irrespective of whether or not the establishment of that fact is necessary for any legal purpose.

33. The Supreme Court found relationship in s 10 is concerned with a legal relationship, not a biological relationship or biological fact.

34. The Supreme Court decided the order for Mr Young's adoption brought the legal relationship (if it existed) between him and Mr Hemmes to an end. As such, even if the biological relationship was proven, the law did not allow the court to grant the orders sought as there was no legal relationship.

35. Regardless of the decision in *Hemmes v Young*, the court noted the fact of a biological relationship is not irrelevant for the purposes of section 10, in most cases, proof of that fact will justify a declaration that the legal relationship of father and child exists, but that biological fact does not lead to that conclusion when there has been an adoption unless the biological father is also the adoptive father.

Part 2 Status of Children Act 1976

36. Part 2 of the Act determines who are the legal parents of children born as a result of specified AHR procedures involving the use of donated gametes.

37. The presumption of paternity in Part 2 overrides any conflicting evidence of paternity that could arise by virtue of Part 1, including a declaration of paternity or a paternity order.

38. Part 2 is subject to Part 3 of the Human Assisted Reproductive Technology Act 2004 which provides detailed provisions in regard to the collection and storage of identifying information of donors and their offspring. When the child reaches 18 years of age, information about the donor (who is their biological parent) must be provided to the child on their request.

39. Section 21 of the Act states that a non-partner semen donor is not, for any purpose, a parent of a child of the pregnancy.

40. Section 26 of the Act states that section 21 has effect despite:

    a. any conflicting evidence under section 8 that the man who produced the semen was the father of the child of the pregnancy:

    b. any conflicting declaration of paternity made under section 10 that the man who produced the semen was the father of the child of the pregnancy.

Care of Children Act 2004

41. The paramountcy principles of the Care of Children Act 2004 ("COCA") are not relevant to proceedings regarding legal parenthood under the Act, however, the court should still have regard to a child's welfare pursuant to the articles contained in the United Nations Convention on the Rights of the Child (UNCROC),

42. Section 41 COCA allows the Family Court to embody the terms of an agreement between the parents of a child and a donor as the agreement relates to contact between the donor and child, or to the role of the donor in the upbringing of the child. This is not limited to written agreements.

43. Section 41 appears to be the result of legislature change from the case of P v K [2003] 2 NZLR 787. Counsel notes the following comments of His Honour Justice Priestley:

    a. [177] "This Court is aware anecdotally that AID [Artificial Insemination by Donor] techniques are frequently employed by lesbians and homosexuals to bring about the conception of children without heterosexual contact. The issue of infertility flowing from a sexual preference undoubtedly has potential to spark both emotion and prejudice in the community. The fact remains that children are being born into and raised by such family units."

    b. [179] "..it is undesirable that fathers and children in the situations of this father and this child should be left legally marooned."

UNCROC

44. Generally, the UNCROC supports the principle that, where possible, a child's paternity should be established unless it is contrary to his welfare. Of relevance are Articles 7-10 UNCROC.

Family Proceedings Act 1980

45. Section 54 of the Family Proceedings Act 1980 states that in any civil proceedings (whether under this Act or not) in which the parentage of a child is in issue, the court may, of its own motion or on the application of a party to the proceedings, recommend that parentage tests be carried out on the child and any person who may be a natural parent of the child.

Interpretation Act 1999

46. Section 6 of the Interpretation Act 1999 states "An enactment applies to circumstances as they arise."

[13] Ms Homes relies on the application of Part 2 of the Status of Children Act which was inserted on 1 July 2005 by s 14 of the Status of Children Amendment Act 2004. Part 2 applies to this case.

[14] The primary submissions made by Ms Homes are in reliance of s 21 of the Act which prevents the creation of a legal parent/child relationship between the donor man and the child. Section 21(b) refers to the semen or part of the semen used for the procedure (AHR procedure was produced by a man) Man A was not her partner. Subsection (2) then goes on to say that Man A is not for any purpose a parent of the child of the pregnancy. Ms Homes argues that therefore the applicant cannot be deemed to be a parent of any child of the pregnancy and has no status to bring an application for a declaration of paternity. Therefore the application has no prospect of success and should be struck out.

Judgment

[15] I make the following orders:

> The Court grants the application to strike out brought by the respondents. The Court dismisses the application for security of costs which is redundant in view of the first order.
>
> The reasons for these orders are as follows:
>
> (a) [Robby] was conceived as a result of artificial insemination and as such is an AHR procedure as defined by s 15 Status of Children Act 1969 ("SCA").
>
> (b) The dispute between the parties centres on whose semen successfully resulted in [Robby]'s conception. The applicant is focused on determining his biological status. The question is whether the SCA (Part 2) is the appropriate vehicle to determine that issue or does it only govern the legal status of the parties. I hold that the SCA Part 2 applies to the legal status of the parties not the biological status. This is because

of how s 26 SCA affects the application of s 21 meaning the application is not affected by a dispute over the identity of the sperm donor. As such, the applicant Mr [Lane] has no legally recognised parental relationship with [Robby]. This means the s 10 application brought by Mr [Lane] must fail and therefore should be struck out pursuant to rule 193 Family Court Rules without determining whether or not Mr [Lane] is in fact the biological father.

(c) I hold the ratio of the Supreme Court decision in *Hemmes v Young*[1] applies to this case and the Family Court in this case is bound by it. The Supreme Court held s 10 SCA could not be used by a child to determine who his biological parent was as its purpose was to determine "legal" paternity, not "biological" paternity. The applicant seeks to distinguish this case from *Hemmes*. *Hemmes* which concerned adoption while this case concerns artificial insemination. I do not accept that submission.

(d) I find that Mr [Lane]'s status is determined by s 21 SCA. I find that s 26 applies. The effect of s 26 is where there is conflicting evidence of paternity s 21 still applies. Section 26 states that s 21 applies even if there is a dispute about the identity of the donor. It means that neither Mr [Lane] or Mr [Nash] are the parent for any legal purpose.

(e) Therefore, there is no need to consider any document which disputes the identity of Man A under s 21. This is because it does not have an effect on the outcome. Regardless of Man A's identity, he is not or does not have a legal parent/child relationship with [Robby] which can be recognised by s 10. Any such relationship is purely "biological". The Court must apply the legislation set by Parliament. Wider value judgment issues as to whether this outcome is in the best interests of the child are for Parliament.

[1] *Hemmes v Young* [2005] NZFLR 887.

(f) This case is also different from *K v M*[2], as [Robby] was conceived after the 2004 amendment came into effect.[3] This amendment replaced s 5 with Part 2 of the SCA, including ss 21 and 26. In that case it was found that under s 5 only a sperm donor's rights as a father are extinguished. Hence, the Judge found they were the father. Section 21 differs from s 5 as it contains much stronger language stating that the sperm donor "is not, for any purpose, a parent of any child of the pregnancy". The stronger language of Part 2 appears to be for the purpose of recognising that society does not view a donor of genetic material for fertility treatment to be a parent of the child.

[16] Accordingly, for those reasons there is no prospect of success in the application and it should not proceed to any further to hearing. The criteria in rule 193 has been established. Therefore, the application to strike out is granted. It was stated in *Re Coyne*[4] that in determining a strike out application "any document relied upon should be construed in the way most favourable to the impugned pleading". For the reasons above taking the best case analysis of the applicant's case there is no prospect that the applicant will be successful. The application should therefore be brought to an end.

[17] There are other options available to the applicant. Whilst I have struck out the application under s 10 it can be argued under UNCROC the child has a right to know who his biological parents are. In New Zealand this right is governed by the Human Assisted Reproductive Technology Act 2004 ("HART"). Under HART a provider of fertility treatment services must keep a donor's details and provide them to a donor offspring who requests them when they are 18. Mr [Lane] has the option to seek to have the Registrar update the HART information under s 85B of the Births, Deaths, Marriages and Relationship Registration Act 1993. There is an issue re HART, in that the legal parents of a child born by fertility treatment do not have to make them aware of their belief on who is the biological parent.

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[2] *K v M* [artificial insemination by donor] (2002) 22 FRNZ 360 (FC).
[3] Status of Children Amendment Act 2004, s 14.
[4] *Re Coyne* [2005] NZFLR 678.

[18] In addition Mr [Lane] could seek a contact order under the Care of Children Act. He would have to apply for leave to apply as he is not a legal parent or guardian but would assert he is the child's biological father and therefore should be granted leave as in the *P v K* case. The time for this option is tight because the child is turning 16 in less than a year and the Court will not have jurisdiction to determine a contact order after he attains 16 years. The Family Court would have a difficult issue to determine whether in granting leave whether to ascertain the views of the child as required by s 6 COCA.

[19] I direct any application for costs to be filed in 14 days; any reply 14 days thereafter. I direct the file be placed before me for determination of any costs application.

_____

Judge DA Burns
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 07/10/2022