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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2010-004-001891
[2023] NZFC 7726

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[BELINDA LAKE] Applicant
AND	[DOUGLAS NEWTON] [LEANNE NEWTON] Respondents

Hearing:	21 June 2023
Appearances:	K Crooks for the Applicant D Chambers KC for the Respondents A Cooke as Lawyer for the Children
Judgment:	20 July 2023

RESERVED DECISION OF JUDGE B R PIDWELL
(Final parenting order as to contact)

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[1] It is a truth universally acknowledged that justice delayed is justice denied. There is no greater example than the outcome of this case.

[2] Mrs [Belinda Lake] and her husband [Ian] asked the Family Court in 2017 for help to see their two grandchildren, [Paul] who was 9 and [Susan] who was 7 years

old at the time.[1] She had been very involved in their care, moving in with her daughter when [Susan] was born and living with the three of them for at least the first few years of [Susan]'s life. She was an important figure in their day-to-day lives in those early years.

[3] Her daughter, [Jennifer Lake], had separated from the children's father, [Douglas Newton], before [Susan] was born, after a relatively short relationship of about two years. As a supportive mother and grandmother, she moved from [location deleted] to Auckland to help her daughter raise her grandchildren.

[4] Her daughter [died] in [2016]. The children had been in an equal shared care arrangement moving between each parent's household at the time of their mother's death. By default, they went into their father's fulltime care. Mrs [Lake] saw the children briefly after their mother's death. Due to issues between the adults, the last time she saw them was in March 2016.

[5] Her application to the Family Court was filed the following year and was strenuously opposed by Mr [Newton] and his new wife. The proceedings were stymied by satellite litigation instigated by Mr and Mrs [Newton] for the next six years. They ultimately lost their appeals.[2] During those years, the children lived with their father and stepmother, and naturally grew and developed. They had no contact whatsoever with their grandparents or members of the maternal family.

[6] When the Supreme Court finally unlocked the legal door for the Family Court to step back in to help this family, the children's views had substantially changed.[3] Now teenagers, they said they did not want to see their grandparents and held them in the same contemptuous view held by their father and stepmother.

[7] Time has not healed the rift within this family. It has cemented it.

[8] Mr [Newton]'s view has been stoically consistent for six years – he sees no benefit to the children having any relationship with their maternal grandparents.

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[1] [Paul] was born on [date deleted] 2008; [Susan] was born on [date deleted] 2010.
[2] *Newton v Family Court at Auckland* [2022] NZCA 207; [2022] 2 NZLR 846.
[3] *Newton v Family Court at Auckland* [2022] NZSC 112.

Ultimately, he now does not oppose a parenting order being made that Mrs [Lake] have contact with the children if instigated by them. That is all she is seeking, at the end of a long and torturous legal road. She concedes that forcing the children against their stated will would be futile given their ages (they are now 15 and 13 years old) and the passage of time.

[9] Sadly, [Ian Lake] died in December 2022, not having seen his grandchildren again.

[10] There are no issues for the Court to determine as the application is unopposed and an order can be made by consent. But, as submitted by counsel, this case was remarkable and unusual, and some judicial comment is warranted.

Section 133 report

[11] [Paul] and [Susan] have been subject to Family Court proceedings from the year [Susan] was born when their parents separated. The Court had directed and obtained two reports from a psychologist Renuka Wali; the first dated 18 May 2011 and the second dated 28 February 2014. A final parenting order was made by the Family Court on 30 June 2014 which provided for the children to be in the shared care of their parents.

[12] The case had been managed by His Honour Judge de Jong. In his final decision dated 30 June 2014 when making the final parenting order, he started his decision by saying:[4]

> "It is difficult to see how many times this Court has been called on to determine matters involving these parties who separated in August 2009 and have two children".

[13] [Paul] and [Susan]'s parents simply could not agree on any aspect of their care and upbringing.

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[4] *[Lake] v [Newton]* FAM 2010-004 001891; Oral Judgment of Judge de Jong 30 June 2014, at [1].

[14] After the children's mother died and Mrs [Lake] filed an application for a parenting order seeking contact with the children, Judge de Jong directed a further s 133 psychological report, to provide the Court with expert psychological evidence to assist it to determine what was in the children's best interests and welfare, given the history and the tragedy of their mother's death. He noted that the children did not have contact at the time with the maternal side of the family and asked the previous court psychologist to be re-appointed if she was available. That direction was made on 27 November 2017.

[15] In her expert report to the Court in 2014, Ms Wali had said: [5]

> 5.1 "[Belinda] and maternal grandfather ([Ian]) were present for the last part of the observations at the maternal home. Both children received them warmly. [Paul] was particularly interested in initiating play with his grandfather with a toy rocket – I understand that flying technology and aircrafts are a shared interest, and grandfather was appropriately responsive. [Belinda] stepped in to cleaning up the kitchen where the children had been baking with their mother, which was consistent with the teamwork and understanding between the two.
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> 5.2 [Paul] and [Susan]'s interview reflected a strong bond with their maternal grandmother. [Paul] chose to draw her first in his paternal home drawing (watering the plants) and describing her as mostly happy. In the sentence completion task, he named her as the person who worries about him most, saying that she worries about him "getting into trouble with [Susan]", but was not able to elaborate further on this. As stated previously, [Susan] had named her Nana (along with her mother) as her favourite people in the maternal home. She also named her Nana as a person who makes her happy because she "looks after me with a happy face". The only negative mention by [Susan] regarding her grandmother was at a later stage, while exploring different feelings. Regarding if anyone makes her angry, she said "Nana does" but was unable to provide any details.
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> 5.3 Both children appear to have a close and positive relationship with their maternal grandmother, who has been closely involved as a co-parenting figure in their lives since [Paul] was one and a half years and all of [Susan]'s life. The grandmother has been residing with them throughout, except for a few months last year when she obtained separate accommodation. I understand that during this period she continued to be closely involved such as being responsible for the children's care when their mother had study related demands, FaceTime contact, and overnight stays with one child at a time. They are all currently back residing together, which I understand is until Ms [Lake] secures independent rental accommodation".

[5] Section 133 report, 28 February 2014 at [5.21].

[16] Ms Wali concluded that both [Paul] and [Susan]'s parents were competent and capable parents and noted the most apparent risk to their wellbeing was the ongoing conflict and mistrust between them.[6]

[17] That report significantly assisted the Court in reaching its final conclusion that it was in [Susan] and [Paul]'s best interests to be in the shared care of both their parents.

[18] It was inevitable therefore that when their mother died, and Mrs [Lake] was not able to see her grandchildren, that Judge de Jong considered it essential to obtain an updated report from the psychologist who had previously worked with the children, and provided expert evidence to the Court to assist it to determine what contact would best meet their needs in these tragic circumstances.

[19] Had Ms Wali been able to complete her report at that time, the Court would have been able to conduct a merits-based inquiry and determine what contact, if any, the children should have with their maternal grandparents. However, as the chronology of events over the past six years shows, it is clear that the [Newton]s did everything in their power to stop that from happening. [7]

[20] Mr Cooke, lawyer for the children, submitted:[8]

> "The concluding inference to be drawn is that the [Newton]s took all steps they could to frustrate the application of [Belinda Lake] and to prevent any inquiry by a psychologist and of the court into the merits of the contact application and, in particular, any inquiry into the views of the children and any possible influences on those views.
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> A psychological report, if obtained in 2017/2018, may have provided a pathway for [Susan] and [Paul] to have a relationship with their maternal grandparents.
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> The Care of Children Act in part is about respecting the rights of children. This includes the right to have a relationship with the maternal family group – with this being maintained and strengthened – if appropriate – and in the absence of issues of safety.

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[6] Section 133 report at [7.1.2].
[7] *Newton v Family Court at Auckland* [2022] NZCA 207 per Goddard J, as captured in the first 150 paragraphs of the Court of Appeal's decision.
[8] Closing submissions of lawyer for child; 18 June 2023 at para [55].

> The process and consequence of this litigation is that the children did not have the opportunity of any merits based inquiry as to their relationship with their maternal grandparents".

[21] I concur wholeheartedly with Mr Cooke's submission.

[22] The Family Court does not direct a s 133 report lightly. It must be satisfied that it is essential to the disposition of the proceedings.[9] When the proceedings were remitted back to the Family Court after a six year hiatus, no counsel submitted that a 133 should be directed. That was because there was a glimmer of hope that agreement could be reached for [Susan] to have contact with her grandparents by text message, to commence over the summer holiday break, slowly at her pace and instigated by her. All indicators were that counsel would work co-operatively to facilitate that which was an appropriate child-focussed way of opening the door to contact starting and then building from there.[10]

[23] For reasons outlined later, contact did not occur. Mrs [Lake] has now reached the point where she is not pursuing her application for a parenting order beyond seeking an order that [Paul] and [Susan] can contact her by email or phone at any time they wish in the future. Her door will always remain open to them. In the words of her counsel:[11]

> "The applicant accepts that there now is little point in seeking a further direction for a s 133 report. The damage has been done. She now simply seeks an order that the children are able to contact her at any time in the future should they wish to do so".

Section 5(e) Care of Children Act

[24] The Care of Children Act 2004 specifically provides an avenue for grandparents to apply for a parenting order to have contact with the child in a situation where the child's parent has died.[12] That provision, coupled with the principle that children's relationships with their wider family group should be preserved and strengthened is a clear indication from parliament of the importance of ensuring

[9] Care of Children Act 2004, s 133(3)(a).
[10] FAM-2010-004-001891 Minute of Judge Pidwell 3 November 2022.
[11] Applicant's submissions dated 16 June 2023 at [14].
[12] Care of Children Act 2004, s 47(2)(a).

children are connected with both sides of their family, when the family breaks down for whatever reason. [13] In circumstances where a child's parent dies, parliament has specifically legislated that a grandparent has a direct line to the Family Court to assist in ensuring that the relationship link with the wider family is preserved and strengthened. Grandparents hold a very special place in a child's life.

[25] Mrs [Lake] wanted to maintain a relationship with her grandchildren who she had been so closely involved with, and indeed lived with for almost the first four years of their lives. However, the children's father, Mr [Newton] and his new wife strenuously opposed the application from the very outset. Her application simply asked for contact with the children during school holidays, phone contact and Skype contact. That was met by an affidavit 63 pages in length.[14]

[26] Mr [Newton]'s affidavit in summary stated that he was concerned about the potential exposure of the children to the grandparents and considered any exposure or contact with them would be detrimental to their wellbeing. He saw Mrs [Lake] as the driving force between the conflict between him and the children's mother in the Family Court.

[27] He acknowledged that he did not know Mr and Mrs [Lake] well and said he had tried to start a fresh relationship with them after the children's mother had died. They had been invited to their home around the time of the funeral and he had sent photos and videos of the children. However, those small steps abruptly stopped when, in his view, the grandparents refused to give the children back some belongings that were at their mother's home. There were some items which were of special significance to the children, including iPads with special memories on them. There were other issues over the children's mother's inheritance and provisions of her will and trust which caused friction.

[28] Mr [Newton]'s evidence was that:

> "He could not ever forgive the grandparents for their behaviour over these issues and we felt sick about the idea of cutting the kid's grandparents off".[15]

[13] Care of Children Act 2004, s 5(e).
[14] Affidavit of [Douglas Newton] dated 1 September 2017.
[15] Above at [58].

[29] His evidence was supported by a further 19 page affidavit from his new wife, [Leanne Newton] whose view was that Mrs [Lake] had no insight into the emotional wellbeing of the children. She saw herself as being a strong mother figure to them. That was reinforced in a final affidavit filed by Mr [Newton] when he said "[Leanne] is the children's mother and does an excellent job with all four children".[16]

[30] The final hearing was conducted on a submissions only basis. Mr and Mrs [Newton] did not attend the final hearing. Their evidence was filed late. Their counsel did not file written submissions.[17] They had essentially disengaged from the Court process. They had not replied to any efforts made by Mrs [Lake] to open the door for [Susan] to have contact with her over Christmas, despite their agreement for contact via text message to start. They did not respond to any correspondence, even when it related to the grandfather's death.[18]

[31] Ms Chambers explained that she had prepared a letter two weeks after the grandfather's death in December 2022 but due to an administrative error, this letter had not been sent. She conceded that was sloppy practise but could not provide any reasonable explanation for why it had not been sent until 1 February 2023.[19]

[32] The conduct of the [Newton]s in terms of the content of their evidence, and their disregard for court directions and process in the short time I was overseeing the file, sent a resounding message that they disrespected the Family Court process, did not consider there was any benefit in engaging with the Court directions and timetable, and would not comply with the efforts that were being made to foster the children's relationship with their grandparents.

[33] That conduct is incompatible with the s 5(e) principle and the overwhelming need for children to know where they come from, who they are linked to from both sides of their family, irrespective of adult views of the other.

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[16] Affidavit of [Douglas Newton] dated 23 May 2023 at [9].
[17] Ms Chambers did address the Court orally in reply.
[18] Affidavit of [Belinda Lake] dated 3 April 2023 at [3] – [13].
[19] Apart from the fact she personally was on leave over the summer. All correspondence was copied to her instructing solicitors.

[34] Despite Mrs [Newton] being an officer of the court herself, she stated in evidence her view that officers of the Family Court had repeatedly acted in a sloppy, partial and seemingly biased way against them and failed to perform their roles and duties to the Court.[20] An opinion such as that is not evidence and should not be included in an affidavit. There were numerous statements in the [Newton]s' evidence which was inadmissible opinion or submission, not fact. It is somewhat surprising that such evidence was filed in light of the Court of Appeal's clear statement that such a practice must stop.[21]

[35] The volume and tone of the evidence filed by the [Newton]s in response to Mrs [Lake]'s seemingly benign application, their clear mistrust and distrust they have of both her and the court system, and their means and tenacity in ensuring that the children's views were not independently obtained has led Mrs [Lake] to the understandable position that she will not force the situation any longer. She will simply wait for the children, in their own time, to form an independent view. She is hopeful that they will seek her out in future years.

Section 6 Children's views

[36] The Court must take into account the views of the children when making a substantive decision for them. That point was strenuously argued by Mr and Mrs [Newton] in their appeal in the Court of Appeal where they submitted that children's views must be taken into account before the Court makes a direction under s 133. That submission was not upheld by the Court of Appeal. They did state however:[22]

> [229] "It would be difficult to overstate the importance in the scheme of COCA of the child's right to express their own, authentic views on matters that affect them, and to have the views they express taken into account. Ensuring that children are supported to exercise that right is an essential corollary of treating their welfare and best interests as a paramount consideration".
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> And further:
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> [234] The need for an LFC to exercise judgement about the matters on which a child's view is sought is reflected in s 9B of the Family Court Act. The LFC

[20] Affidavit of [Leanne Newton] dated 28 November 2018; at [17].
[21] *Newton v Family Court at Auckland;* paras [185] – [191].
[22] *Newton v Family Court* [2022] NZCA 207 at [229].

> must meet with the child. And, as s 9B(2) expressly provides, the LFC must ascertain the child's views on matters affecting the child relevant to the proceedings *if it is appropriate to do so*. That judgement must of course be exercised having regard to the strong direction in s 6 of COCA, and article 12 of the CRC.

[37] Whether a child sees a grandparent is a substantive decision and the child's views must be considered by the Court, particularly in this case where the children are 13 and 15 years old. However, at the outset of the proceedings once the stay of proceedings was lifted, Mr Cooke was advised by Ms Chambers for Mr and Mrs [Newton] that [Paul] did not want to talk to him.[23] In light of the background to the case, and the passage of time, Mr Cooke sought a direction that [Paul] was not required to meet with him. That was balanced against the fact that he had been able to meet with [Susan]. She was concerned that her views would be misrepresented by him and had asked to record the discussion. She was prepared to think about talking to both of her grandparents (and especially her grandfather [Ian]) in order to develop a relationship with them, essentially a reintroduction to her grandparents. In her mind, talking meant texting. She was open to considering to a relationship with her grandparents. She wanted it to be slow and easy and not forced upon her. [24]

[38] As a result of that memorandum from Mr Cooke, a discussion was had at a judicial conference before me on 3 November. A direction was not made pursuant to s 9B(3) that he was not required to meet with [Paul]. The understanding was that if the door was opening for [Susan], [Paul] may come around in light of his age. There was an acknowledgment that it was futile to force contact on him at his age and stage. Furthermore, the timing was not ideal as he was likely to be facing exams at that point in time.[25]

[39] As a result, [Paul]'s views were not before the Court, but [Susan]'s views were. She was open to communicating with her grandmother slowly, and on her terms, firstly by way of text message. However, that did not occur as the [Newton]s simply did not respond to Mrs [Lake]'s requests to engage, or Mr Cooke's attempts.[26]

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[23] Lawyer for child report dated 20 October 2022 at [40].
[24] Above at [20].
[25] Minute of Judge B R Pidwell 3 November 2022 at para [4].
[26] Affidavit of [Belinda Lake] dated 3 April 2023, exhibits A – G.

[40] Mr Cooke submits, and I accept, that even with children of [Paul] and [Susan]'s ages, their views cannot completely be relied upon without considering whether there have been external influences, conscious or otherwise, which may have distorted the children's actual or professed outlook.[27]

[41] In *Allen v Wade*[28] Her Honour Judge Clarkson said that children's views must be looked at within the context of their adult relationships:

> "The notion that children's views have to be "independent" of those of their parents is unrealistic and defies the whole notion of parenting. Everyone's beliefs, and more so children's, are influenced by significant people in their life, especially those in a position of authority".

[42] In this case, the children had a positive and close relationship with the grandmother in their early formative years. Mrs [Lake] did a significant amount of hands-on parenting and was actively involved with them. The Court has clear evidence from its own expert that the children had a strong bond with Mrs [Lake].[29]

[43] However, by December 2018, the children had not had contact with their grandparents for over two and a half years. The then lawyer for child stated:[30]

> "As reported in this memorandum the children's expressed view of their grandmother has changed from being positive and loving over this interlude to one of apparent dislike and contempt".

[44] Mr Cooke posed the question this way:

> "What was it that resulted in the ostensible change of views and perceptions of the children between the time of the Wali report and the report of lawyer for child in November 2018 and which continue today?".

[45] He is asking the Court to draw an inference from the chronological narrative that Mr and Mrs [Newton] have significantly influenced the children's views, based on their steps which have consistently prevented the Family Court conducting a merits- based enquiry into the children's best interests and welfare. He submits it would be inevitable that children would be influenced by such a state of affairs, and I

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[27] *D v W* (1995) 13 FRNZ 336, High Court at 349.
[28] *Allen v Wade* [2017] NZFC 5189 at [174].
[29] Section 133 report dated 28 February 2014 at [5.9] – [5.23].
[30] Lawyer for child report dated 3 December 2018 at [64].

concur. The children now state that they don't want to live under court orders or be subject to ongoing litigation, however, they have not actually been involved during the six year period when the Family Court proceedings were stayed. Thus, the inference can readily be drawn that their views of the current process, their lawyer and court orders can only come from Mr and Mrs [Newton].

[46] Despite the positive relationship the children had with their grandmother stemming from their early formative years, their last memory of her is frozen in the deeply traumatic time after their mother's death and the resulting conflict between the adults of their possessions and inheritance. There has been no therapeutic intervention involving Mrs [Lake]. The children's stated views have been supported wholeheartedly by their father and stepmother. The fact that Mr [Newton] is now referring to Mrs [Newton] as the children's mother in an affidavit which will only be read by the grieving grandmother shows the level of venom still in the relationship between the adults. The children will not be immune to that. It is a fair inference to draw, and perhaps the only inference readily available to the Court, that the children have been influenced by the conflict, and unduly influenced by the negative views held by Mr and Mrs [Newton] of Mrs [Lake].

[47] I am satisfied that the children's views have been adversely influenced by their father and stepmother to the point where their views cannot be relied upon as being independently held. However, Mrs [Lake] now acknowledges that because of the passage of time, and the deep inroads the [Newton]s have made into the children's views of her that it may do more harm than good to try and force them to have contact with her during their childhoods. She does not want further conflict and does not want to force more intervention onto the children against these firmly held views.

Section 9A Family Court Act 1980

[48] Counsel who appear in the Family Court have a statutory duty to promote conciliation.[31]

[31] Family Court Act 1980, s 9A.

[49] Conciliation means that they should be working constructively with other counsel to reach an overall resolution which meets the children's needs in the particular circumstances of the case. The Family Court process is designed to assist families in resolving disputes in a child focussed way, not to create an arena for conflict. Counsels' engagement with the Court and other counsel, and the content of affidavits prepared by them on behalf of their clients, should be non-confrontational and non-inflammatory. They should not contain submissions, inadmissible evidence, speculation or incorrect facts. The purpose of affidavits is to place relevant facts before the Court. An affidavit is not a "device to score points, denigrate or indulge in advocacy."[32]

[50] The focus under the Care of Children Act 2004 must always be what is in the children's best interests and welfare and decisions must be made in their timeframes.[33] The Court with the specialised jurisdiction to focus on children's wellbeing was not able to make a decision for them within their timeframes.

Orders and directions

[51] I have written a letter to [Paul] and [Susan] to explain to them the outcome of the proceedings. I direct Mr Cooke to give it to them in a child focussed way. Thereafter, his appointment is terminated with the thanks of the Court.

[52] I make a final parenting order in favour of [Belinda Lake] granting her contact with [Paul] and [Susan Newton] in the following terms:

(a) The children may contact their grandmother by way of email, text message or face-to-face at any time they wish to do so.

Signed at Auckland this 20th day of July 2023 at 2 pm.

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Judge BR Pidwell
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 20/07/2023

[32] *Walker v Walker* [2006] NZFLR 768 at [11].
[33] Section 4(1) and (2)(b).