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

NOTE: PURSUANT TO S 182 OF THE FAMILY VIOLENCE ACT 2018 AND S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2023-070-000163
FAM-2023-070-000166
[2023] NZFC 6884

IN THE MATTER OF	THE FAMILY VIOLENCE ACT 2018
AND	
IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[SUSAN CROY] Applicant
AND	[MARCUS STAFFORD] Respondent

Hearing:	17 April 2023
Appearances:	J Greenhill for the Applicant Respondent appears in Person K Yarrall as Lawyer for the Child
Judgment:	19 April 2023

JUDGMENT OF JUDGE S J COYLE

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[1] This is a conference in relation to proceedings concerning [Lauren Croy], born [date deleted] 2022. Ms [Croy] sought and obtained on a without notice basis a temporary protection order and an interim parenting order.

[2] The interim parenting order provides for [Lauren] to be in her care and to have supervised contact with [Lauren]'s father, Mr [Stafford]. It is to be at KidzKare but the funding for that has not been released as yet following the wording of the eDuty direction.

[3] I am being asked today to authorise the release of that funding. Mr [Stafford] is here and he is keen to have contact with [Lauren] and if that is at KidzKare then so be it. It is appropriate therefore that funding be released as the Court has already determined that his contact needs to be supervised.

[4] The temporary protection order will become final by operation of law on 20 June next. Mr [Stafford] has filed an objection to attending the Stopping Violence programme, but at this stage has not filed anything in relation to either the parenting or protection order proceedings.

[5] Following discussion with him today, at this stage he intends to defend the temporary protection order being made final and at this stage he intends to continue to act for himself. That being the case s 95(1) of the Evidence Act 2006 is triggered in that it prevents Mr [Stafford] from cross-examining Ms [Croy] himself, she being a protected person, pursuant to the temporary protection order.

[6] Accordingly, the Court needs to give consideration as to the appointment of counsel to cross-examine Ms [Croy] on Mr [Stafford]'s behalf. That has routinely occurred through the appointment of counsel to assist under s 9C(1)(c) and (2)(b) of the Family Court Act 1980. Justice Katz in the decision *Irving v Irving*, a decision sent to the High Court by way of case stated, has held that the role of counsel to assist because of the particular wording of s 9C(1)(c) and (2)(b) of the Family Court Act 1980 is to only put the questions to, in this case Ms [Croy], as given to counsel to assist by Mr [Stafford].[1] That is, the High Court has held that counsel to assist cannot in effect 'freely' cross-examine on behalf of Mr [Stafford].

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1 *Irving v Irving* [2021] NZHC 2269 at [23].

[7] There is an exception to that in terms of *Irving v Irving* when children are involved[2], but in this case the COCA and family violence proceedings have not been consolidated and thus [Lauren]'s counsel, Ms Yarrall, has only been appointed under the Care of Children Act as she cannot be appointed under the Family Violence Act 2018. Ms Yarrall therefore cannot attend, certainly in any participatory basis, in the family violence hearing.

[8] The Court of Appeal in *Fahey v R* has discussed at length the appointment of amicus and/or standby counsel in the criminal context.[3] In *Fahey* the Court of Appeal has held that the role of standby counsel is to effectively conduct a defence on behalf of a defendant in criminal proceedings and is not limited to simply putting the questions that are sought to be put by a defendant. The appointment of either an amicus or a standby counsel is available to the Court in terms of its inherent powers to regulate its own processes (see *McMenamin v Attorney-General*) and not by statute.[4]

[9] If the focus is on justice and fair process, if one adopts the *Irving* approach then a self-represented litigant is at a distinct disadvantage because counsel to assist appointed under s 9C can only put the questions given by a self-represented litigant. He or she is not experienced and often does not know what questions need to be put in order to properly advance their case. The consequent result is a lesser standard of advocacy and from a Family Court Judge's perspective that often means the evidence is not properly tested. These issues were squarely addressed by the High Court in the *Irving* decision.[5]

[10] As I have set out above, the result in the *Irving* decision was arrived at because of the particular wording of s 9C. Whilst *Fahey* was referred to by the learned High Court Judge, nowhere in *Irving* does it say to hold that the Family Court cannot appoint standby counsel and indeed the Court of Appeal decision, which in terms of *stare decisis* holds more weight and is binding on the District Court, appears to hold specifically that standby counsel can be appointed through the Courts inherent powers to regulate its own processes. Thus, I choose to exercise this Courts inherent powers

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2 *Irving v Irving* at [52].
3 *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392.
4 *McMenamin v Attorney-General* [1985] 2 NZLR 274.
5 *Irving v Irving* at [30]–[31] and [38]–[43].

to regulate its process so as to ensure that justice is done and seen to be done between the parties by appointing standby counsel and not counsel to assist.

[11] Against that background therefore I make the following directions:

(a) Mr [Stafford] is to file his notice of response and affidavit evidence in support of his notice of response to the protection order matters no later than 28 April 2023.

(b) Once he has done so the registrar is then directed to appoint standby counsel to cross-examine (in recognition of s 95(1) of the Evidence Act) Ms [Croy] on behalf of Mr [Stafford] for the reasons set out above. The restrictions in *Irving* as to what questions can be put do not apply to standby counsel.

(c) The registrar is directed to set the matter down for a half day hearing. The purpose of that hearing is to determine whether the temporary protection order is to be made final or not and whether Mr [Stafford] is to be exempt from attending the Stopping Violence programme or not (in terms of a s 189 objection).

(d) At the conclusion of that hearing the Judge can then make directions to progress the parenting order matters.

(e) In relation to the parenting order matters I direct that funding is to be released for 14 sessions of supervised contact at KidzKare.

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Judge SJ Coyle
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 19/04/2023