

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

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**IN THE FAMILY COURT
AT WAITAKERE**

**I TE KŌTI WHĀNAU
KI WAITĀKERE**

**FAM-2015-044-000218
[2023] NZFC 2857**

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[AMANDA PEELING] Applicant
AND	[FRANCINE GORDON] First Respondent
AND	[JULIAN JACOBS] Second Respondent

Appearances: Applicant in person
First Respondent in person
J Warrington for Second Respondent
M Green and A Corry as Lawyer for the Children

Judgment: 28 March 2023
(On the papers)

RESERVED JUDGMENT OF JUDGE S M MORRISON

[1] Ms [Peeling] applies under s 27(2)(b) of the Care of Children Act 2004 to be appointed as an additional guardian for a specific purpose, in respect of her niece, [Louise], who is 11 years old and nephew, [Wesley], who is 9 and a half years old. [Louise] and [Wesley] are the children of Ms [Gordon] and Mr [Jacobs]. Ms [Peeling] is Ms [Gordon]'s older half sibling.

[2] In her supporting affidavit, Ms [Peeling] sets out the background of her Samoan cultural heritage. She seeks appointment as an additional guardian of the children to impart this knowledge on them, within a specified period of contact with her each year.¹ She says she waited until the long-standing proceedings between the children's parents were finalised by her Honour Judge Pidwell on 15 March 2022 before making her application.

[3] The matter came before me in chambers for consideration on 9 December 2022, prior to a judicial directions conference. By that time, each of the parties had responded to Ms [Peeling]'s application, and both Ms Corry and Ms Green had provided initial reports. My minute set out my concerns upon reading the application and the subsequent call for submissions on whether Ms [Peeling]'s application should proceed, or whether it should be struck out under r 193.²

[4] Submissions have now been filed by Ms [Peeling], Ms Warrington for Mr [Jacobs], and Ms Green. Ms [Gordon] has not filed submissions. However, her views on Ms [Peeling]'s application are quite clearly set out in her response affidavit.³

Law

Care of Children Act 2004

[5] The Act allows a guardianship application to be made by “any person”. This can include step-parents, whānau members, foster parents, non-guardian fathers and anyone else involved in the child's upbringing. Leave is not required to bring an application.

[6] The Court has the power to appoint a guardian in addition to any other guardian or guardians of a child, including for a specific purpose.⁴ In that event, the terms of the order should not be so broad as to undermine the powers of the child's natural guardians.⁵

¹ Affidavit of [Amanda Peeling] dated 17 May 2022 at 2.

² Minute of Judge Morrison dated 9 December 2022.

³ Affidavit of [Francine Gordon] dated 29 June 2022 at 6.

⁴ Care of Children Act 2004, s 27.

⁵ *R v R* [2003] NZFLR 200 (HC).

[7] The paramount consideration is as set out in s 4 of the Act: any order made must be in the best interests and welfare of the child, subject to consideration of the principles set out in s 5 and consideration of the children's views pursuant to s 6. The principles of most note are:

- (a) Children's care, development, and upbringing should be primarily the responsibility of their parents,⁶ and should be facilitated by ongoing consultation and co-operation between their parents, guardians, and any other person having a role in their care under a parenting or guardianship order.⁷ This recognises that where possible, a child's parents should be the adults most significantly involved in a child's upbringing.
- (b) Children should have continuity in their care, development, and upbringing.⁸
- (c) A child should continue to have a relationship with both parents and their relationship with whānau, hapū and iwi should be preserved and strengthened.⁹ In *Jombert v Dean*, his Honour Judge Russell considered it beneficial to appoint the child's maternal grandmother as an additional guardian to teach her about her culture and the Māori language.¹⁰ In that case, the child's mother was deceased and her Pākehā father consented to the appointment.

[8] The Court can decline to make an order where it does not serve the best interests and welfare of the child. This includes circumstances in which the appointment of an additional guardian would cause actual and/or potential conflict between the appointed person and the child's other guardians.¹¹

⁶ Care of Children Act, s 5(b).

⁷ Section 5(c).

⁸ Section 5(d).

⁹ Section 5(e).

¹⁰ *Jombert v Dean* [2015] NZFC 5779.

¹¹ *JBT v BDT* [2012] NZFC 842.

[9] The Rules state the Court may order that all or part of an application is struck out for any of the following reasons:

- (a) No reasonable basis disclosed for the application;
- (b) The application is likely to cause prejudice, embarrassment, or a delay in proceedings; or
- (c) The application is otherwise an abuse of the Court's process.

[10] The Court may make such an order on its own initiative, at any stage of the proceedings, on any terms it thinks fit.

Ms [Peeling]'s position

[11] Ms [Peeling] does not want the children involved in the proceedings. She wishes to impart her Samoan cultural knowledge on [Louise] and [Wesley] while they are still young. She states:¹²

... while they are children, they need to have such tools added to their kete of knowledge to be accessed if and when they feel the calling.

She notes that her "attempts to contact the children are often blocked by their parents."¹³ She considers she can share her knowledge by seeing the children two weekends or three days and two nights per year. She last saw them in February 2020.

[12] Ms [Peeling] also wishes to do "background screening" to ensure the children are safe as she is concerned that in the future, the children will go through similar issues to their parents which she witnessed them experience as they grew up.

¹² Affidavit of [Amanda Peeling] dated 17 May 2022 at 4.

¹³ At 4.

[13] Ms [Peeling] states Ms [Gordon] has told her she will not consent to her having contact with [Louise] and [Wesley].¹⁴ She says Mr [Jacobs] deals with her approaches by ignoring or not answering telephone calls or correspondence.¹⁵ She describes him as “malicious” and “manipulative” and has sought a psychological assessment into his “personality disorders”. She considers: “there is a total disregard show [sic] by both parents as to the importance of nurturing my role in the children’s lives.”¹⁶ She says this despite deposing to holding no animosity towards either parent.

Ms [Gordon]’s position

[14] Ms [Gordon]’s position is succinctly captured in paras 13 and 14 of her affidavit.¹⁷ Essentially, she does not consider Ms [Peeling]’s appointment necessary given she is herself exploring her Samoan culture; her mother, the children’s Samoan grandmother, has contact with them daily; and the children do not have an established and ongoing relationship with Ms [Peeling].

Mr [Jacobs]’s position

[15] Mr [Jacobs] deposes to being proudly of Māori, Samoan and English heritage, and to he and the children previously living with their extended paternal aiga. Both children are involved in Samoan cultural or sport groups.

[16] He does not consider it would be safe for the children to have contact with Ms [Peeling], citing a previous sexual assault allegation, and what he describes as a series of harassing attempted telephone calls and texts from Ms [Peeling]. He alleges the children were distressed by their 2020 encounter with Ms [Peeling], when she took them to a cemetery. He declined contact in 2022 and was then warned by Ms [Peeling]’s sister (Ms [Ilott]) that she had threatened to uplift them from school, which resulted in a safety plan having to be put in place. He is considering issuing Ms [Peeling] with a trespass notice.

¹⁴ At 5.

¹⁵ At 4-5.

¹⁶ Affidavit of [Amanda Peeling] dated 30 May 2022 at 3.

¹⁷ Affidavit of [Francine Gordon] dated 29 June 2022.

[17] Mr [Jacobs]’s overall position is captured in paras 20 and 21 of his affidavit.¹⁸ His concern is maintaining the settled and consistent new routine the children have, which he says promotes their secure attachments to himself and Ms [Gordon]. He further says:

... it is common for the children to only see their extended whānau members at family gatherings and in group settings. This dynamic includes whānau members who have already established close relationships with the children.
...

Lawyer for Child’s submissions

[18] Ms Corry was the children’s Christchurch-based lawyer at the time Ms [Peeling]’s application was filed. She reported on 31 August 2022, setting out both the procedural issues with Ms [Peeling]’s application and her view that the application was “not supported by relevant or persuasive grounds and is ill conceived”. She concluded as a result it was inappropriate to seek the children’s views, and submitted:

[12] My approach is informed by an appreciation of the turmoil [Wesley] and [Louise] have had over many years of conflict, illustrated by the 7 year span of litigation in the Family Court, the distress Ms [Peeling]’s application has caused both parents, the lack of any understanding in her papers of the litigation she has sparked, and the lack of grounds and merit in her approach.

[19] She cited several relevant examples at paras 13 to 20, all of which I agree are persuasive reasons not to appoint Ms [Peeling] as an additional guardian of the children.

[20] Ms Green is the children’s Auckland-based lawyer. She provided a fulsome and helpful report on 18 November 2022, and submissions dated 27 January 2023. She submits Ms [Peeling]’s application should be struck out under rr 193(1)(a) and (c) of the Family Court Rules.

[21] Ms Green did not bring their aunt’s application to the children’s attention. She considered doing so may constitute a form of systemic abuse of them and noted her concern about them knowing another family member was now engaging in Family Court litigation about them.

¹⁸ Affidavit of [Julian Jacobs] dated 12 July 2022.

Discussion

[22] I agree with Ms Green that a s 27 application must show a demonstrable benefit to [Louise] and [Wesley]. Any orders made about them must be in their best interests and welfare. [Louise] and [Wesley] are at the centre of decision making in the Family Court, not the adults.

[23] Any additional guardian appointed for the children needs to be able to co-operate and consult with existing guardians. I fail to see how Ms [Peeling] can do this. She has a tentative relationship with Ms [Gordon]. She has a seemingly hostile relationship with Mr [Jacobs]. Her appointment as an additional guardian stands to bring more conflict into the children's lives as a result.

[24] I agree with Ms Corry that Ms [Peeling]'s application is ill-conceived. Ms [Peeling] presents as more concerned with her own desire to be recognised as an important and valued part of the children's lives. Her words and actions show little to no insight into what is best for the children. She displays a complete lack of respect and value of the children's parents who are the most significant adults in their lives and who are best placed to enhance and nurture their cultural understanding, learning and values. I note from the evidence that the children currently have other avenues of deepening their understanding and connection with Samoan culture. In essence, her application is based on her own needs, not those of the children.

[25] The children do not need to be exposed to further conflict regarding their care arrangements. Given the history of proceedings between their parents, that is not in their best interests and welfare. I agree with the submissions of Ms Corry and Ms Green that the children do not need to be re-interviewed by Lawyer for Child, a psychologist or any other professional. They are entitled to be nurtured and to grow in the settled and loving care regime within which their parents are co-operating.

[26] Given the above, there is no reasonable basis for the application to be brought. To allow it to continue would also unnecessarily expose [Louise] and [Wesley] to further litigation, which would be an abuse of process.

[27] Ms [Peeling]'s application is therefore struck out under r 193 of the Family Court Rules.

[28] Given Ms [Peeling]'s application cannot proceed, it is unnecessary to consider whether parts of Mr [Jacobs]'s evidence should be struck out in relation to the substantive proceedings.

[29] Ms Green's appointment is concluded with the thanks of the Court.

[30] I decline to make costs contribution orders.

[31] Any submissions regarding inter parte costs are to be filed within 28 days.

DATED at AUCKLAND this 28th day of March 2023 at 1 pm.

Judge S M Morrison
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 28/03/2023