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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2020-004-000250
[2021] NZFC 6404

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[AMANDA HARRIS] Applicant
AND	[CHARLES BARKER] First Respondent
AND	[MARTIN BARKER] Second Respondent

Hearing:	17 May 2021
Appearances:	S Abdale for the Applicant C Townsend for the Respondents
Judgment:	6 July 2021

RESERVED JUDGMENT OF JUDGE T H DRUCE
[Recall, leave to appeal, interim contact and guardianship directions]

Introduction

[1] The court is required to determine three interlocutory/interim issues:

(a) Should the court recall my interim parenting decision of 10 December 2020 (the "December decision")?

(b) Should the court grant the applicant leave to appeal the December decision 2020?

(c) Should the second respondent father be permitted to have contact with [Lily], [aged under 6 years old], in Sydney, Australia, during school holiday periods?

Issue 1: Should I recall my December decision?

[2] Ms [Harris] seeks recall of my interim decision on the grounds that there is "some other very special reason justice requires the judgment to be recalled". This is the third "category" ground identified in *Horowhenua County v Nash*.[1]

[3] Ms [Harris] has subsequently filed an affidavit sworn 24 March 2021 which she says provides evidence that was not available for her to file on 10 December 2020, namely information held on her iPad but which was inaccessible to her at that time. She alleges her "Apple Id" had been hacked by her former partner, Mr [Ridge] (or his agent) and that she was unable to access relevant messages and photographs stored on the iPad device until early March this year. She says she finally gained access in early March and has since "been able to slowly download my information and present evidence to disprove the allegations made about me". She says she has used this information to apply for a discharge of a final protection order made against her last year in favour of Mr [Ridge]. She annexes five documents to her March affidavit about which I make the following findings:

[1] *Horowhenua County v Nash (No. 2)* [1968] NZLR 632 at 633.

(a) Annexure "A": This is an email dated 20 February 2021 from a [name deleted] at the [campsite] confirming Ms [Harris] was not banned from the camp. Plainly, this evidence was not on the iPad and the evidence could have been filed prior to 10 December 2020.

(b) Annexure "B": This document is said to be a Spark NZ Limited summary record of phone calls/text messages between Ms [Harris] and Mr [Ridge] between September and November 2019. Again, these do not depend on retrieval from Ms [Harris]'s "locked" iPad and could have been filed by her prior to the hearing.

(c) Annexure "C": This comprises some of Ms [Harris]'s hospital records from the period during her relationship with Mr [Ridge]. Again, these did not depend on access to her iPad. Furthermore, they were filed as annexure "C" to her affidavit sworn 20 May 2020 and I had read the medical records that did indicate she had suffered a likely broken rib in late July or early August 2019.

(d) Annexure "D": These appear to be text records between Ms [Harris] and Mr [Ridge] in which Mr [Ridge] acknowledges hurting Ms [Harris] (by fracturing her rib). Ms [Harris] provides no evidence as to why she depended solely on access to her iPad to obtain these records. For example, did she have a cell-phone and was she able to access these records through her cell-phone? Secondly, was there a reason why Spark NZ were unable to provide the records on request?

(e) Annexure "E": These are two photographs of Mr [Ridge] which appear to evidence his drug use. One of these was in her evidence which I saw on 10 December 2020.

[4] In summary, while annexure "D" may not have been available to her on 10 December 2020, the other documents relied on were capable of being produced by her, or had been produced by her for the December hearing. Further, the contents of annexure "D" were of only limited relevance to the parenting issues before the court.

Certainly, if the text records had been available in December last, I am unable to see how they would have resulted in an outcome other than the orders I made on that day. Ms [Harris] would still have been subject to the final protection order against her in favour of Mr [Ridge] and the court would still have been required, by virtue of s 5A, to have taken the existence of that protection order into account.

Result

[5] The application for recall of the court's interim judgment of 10 December 2020 is dismissed.

Issue 2: Should leave to appeal be granted?

[6] Ms [Harris]'s application was filed on 15 March 2021. My decision giving reasons for the orders made on 10 December last, was delivered on 12 February 2021. Ms [Harris]'s application is therefore three days out of time, the time period for the filing of the application being 20 working days. However, the point is not argued by the respondents and, given the extensive delays in these proceedings, I do grant leave to file the application out of time.

[7] Ms Abdale adopts the six relevant matters to be considered as expressed by Ellis J in *Malone v Auckland Family Court*.[2] Ms Abdale also refers to other cases including *Fletcher v McMillan* where the High Court set aside the Family Court's interim decision.[3] On the other hand, Hammond J in *Fletcher* noted that "In the vast majority of cases it is preferable to endeavour to advance the merit hearing timeously..."

[8] At paragraph 25 of her submissions, Ms Abdale then sets out a summary of factors supporting leave being granted.

[9] Ms Townsend, for the respondents, accepts the same six matters as providing the relevant principles to be applied. I now address these.

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[2] *Malone v Auckland Family Court* [2014] NZHC 1290 at [29].
[3] *Fletcher v McMillan* [1996] 2 NZLR 491.

[10] First, the child's welfare and best interests in his or her particular circumstances must be the first and paramount consideration. Statutory considerations relevant here are the importance of timely decision-making (as appropriate to the child's sense of time) and the s 5 principles. There has been unacceptable delay in these proceedings which has been contributed to by all parties and by this court. I commented on the mother's contributions to these delays in both July and September last year in my Reasons Judgment, delivered 12 February 2021 at [57].

[11] Looking forward, these proceedings are now certified ready for a five-day fixture. On 08 July they will be given a firm fixture along with earlier back-up fixtures. In addition, a bid for extra judicial resourcing is currently under way with national administration with a view to the hearing being heard prior to the end of this year.

[12] Bluntly, this case has required a "merits" based, substantive, hearing from the early stages following the without interim parenting orders made in March 2020. Lawyer for child has been advocating for such a hearing as far back as April and June 2020. If this had been adopted, a year's delay would have been avoided.

[13] Will allowing leave to appeal provide a more timely means of achieving certainty and finality in this litigation? This is not addressed by Ms Abdale. I fail to see how it will.

[14] Secondly, the interests of justice, including the interest and finality of litigation. Again, justice and finality require the early hearing of the substantive issues, not further interlocutory time and cost.

[15] Thirdly, given that my December 2020 decision was principally one of declining to determine the substantive safety issues in a two-hour, submissions only hearing, it will have no effect on the ultimate outcome.

[16] Fourthly, these proceedings are of extraordinary importance to [Lily] and her parents (and their respective families) and I accept that the impact of the court's original, without notice, interim orders made in March 2020, continues to be

substantial. I also accept that the interim orders since March last year will have impacted very substantially on [Lily]'s relationship with her mother. On the other hand, the mother had rights to have a "merits" hearing and to consider appeal from that hearing which she could have exercised throughout 2020.

[17] I have taken on case management of this file since December 2020 out of concern to avoid further avoidable delay. On 17 May, I took the decision to direct that the merits hearing proceed with or without the s 133 report (which is grossly delayed and unlikely to be available prior to early 2022).

[18] Fifthly, will [Lily] and her father and paternal grandfather experience prejudice as a consequence of granting, or not granting, leave? Again, there is plain prejudice to [Lily] and all parties, but this arises from the ongoing delay in holding the substantive, merits-based, hearing. The interim issues are of minor import other than ensuring [Lily] has safe interim contact with her mother (which she does) and similarly with her father (which is limited and which will be dealt with later in this decision).

[19] Finally, I am advised by Judge Fleming, who manages the allocation of long cause fixtures, that the granting of leave, or not, will have no impact on the allocation of the required five-day fixture as there is no stay order in force.

[20] In standing back and considering these different factors/matters, I am not persuaded that granting leave to Ms [Harris] to appeal the interim December decision advances her own or [Lily]'s interests in achieving justice or finality. I am aware that the December decision is subject to judicial review and this provide Ms [Harris] with a forum to raise any issues of improper process.

Result

[21] The court declines to grant Ms [Harris] leave to appeal the 10 December 2020 interim decision.

Issue 3: Should [Lily] have contact with her father in Sydney, Australia, and if so, what guardianship directions are required?

[22] [Martin Barker] filed his applications following the relaxing of COVID-19 restrictions on international travel between Australia and New Zealand.

[23] Since the hearing on 17 May, the travel restrictions have been reimposed and as at the date of delivery of this judgment, those restrictions continue to apply. It is likely that the restrictions will be lifted and re-imposed from time to time for the period pending the substantive hearing.

[24] The terms and conditions proposed by Mr [Barker] are entirely usual and reasonable in such situations for a child aged close to six years travelling to and from eastern Australia. The terms and conditions are supported by the other respondent, the paternal grandfather, [Charles Barker]. They are opposed by Ms [Harris].

[25] The contact sought is for up to one week in each of the four school holidays and two further long weekends per annum. The proposed conditions are:

(a) [Lily]'s place of habitual residence to be Auckland, New Zealand.

(b) The father to provide the other parties and lawyer for the child with notice of the specific dates of travel and the itinerary (setting out where they will be travelling to and when).

(c) The father is to provide the other parties and lawyer for child with a photograph of [Lily]'s passport.

[26] The mother's opposition is understandably, in part, an emotional one based on her own feelings that it is not fair that [Lily] should have such contact with her father when she herself is not permitted such liberal and unsupervised contact.

[27] In addition, she identifies the real possibility that [Lily] may be caught in Australia due to a sudden imposition of COVID-19 travel restrictions. This would then likely interrupt [Lily]'s regular fortnightly contact with her mother and her missing

some weeks of school. She relies on the New Zealand government's current travel advisory which gives New Zealand travellers clear warning of the likelihood of delayed returns to New Zealand in such circumstances. The parties have not provided evidence as to the likely length of delay and I take judicial note of the fact that there will be a minimum delay of two weeks before travel arrangements would then be instigated through the New Zealand government to arrange return of travellers to New Zealand via quarantine facilities. Doing the best I can, I estimate that [Lily]'s return to her grandparents' care and to school could be delayed for four to six weeks if she were caught in Sydney.

[28] It is also argued that the father is able to visit [Lily] in Auckland during holidays and is already having unrestricted AVL contact with her. There is no dispute that the father is having phone/video contact with [Lily] most days and indeed, he recently visited her in May in Auckland.

[29] Ms [Harris], in her evidence, also notes that the sealed interim parenting order, made 23 March 2020, requires both parents' contact with [Lily] to be supervised. Having reviewed the court file, my view is that her Honour Judge Duggan's Minute leaves the issue of the father's contact undefined as he was not in a position to apply for day-to-day or for contact due to the COVID-19 travel restrictions that applied at that time. My further view is that the order as sealed incorrectly reflects her Honour's orders. Furthermore, the 23 March 2020 order was fully discharged on 9 July 2020 and fresh interim orders were then made which placed no such restriction on [Lily]'s contact with her father.

Findings

[30] The father and his partner now have a young baby. It is in [Lily]'s best interest to have her relationship with her father and his family "preserved and strengthened" in terms of s 5(e). [Lily] was born in Australia and her parents lived there together from early 2014 to [detail deleted] 2017. It was her mother that insisted on returning to New Zealand with [Lily]. In these circumstances, she has a responsibility, as does this court, to support [Lily]'s relationship with her father (and her half-sibling). No amount of video contact will provide the depth of experience that comes from living

with an absent parent, even if limited to a week or so each holiday period. Accordingly, I find that the proposed contact is entirely appropriate for, and in, [Lily]'s best interests.

[31] What of the COVID-19 related issues? Plainly, periodic travel restrictions are likely to continue at least until this court's substantive decision. It is unclear whether [Lily] will be able to travel these July school holidays, although that possibility is now looking remote. If however the COVID-19 travel restrictions are lifted prior to the July school holidays which commence at the end of this week, it seems likely that no restrictions would be re-imposed again within the following week or two thus making a visit this July reasonably likely to be free of COVID-19 travel restrictions.

[32] [Lily] is not yet quite six. She has the support of her paternal grandparents and her father to make the travel a success. One of those persons will be accompanying her on the air flights both ways. Her day-to-day care is with her grandfather supported by her grandmother (who live apart but at a conveniently close distance to each other). [Lily] is a communicative and outgoing child who is "generally settled and happy in her grandparents' care and at her school": see [52] of my February Reasons Judgment. She can be expected to be excited about, and to enjoy, a week with her father even if this is extended for another two or three weeks if she is caught in travel restrictions while in Sydney.

[33] However, to better manage the risk of disruption due to COVID-19 travel restrictions, I have decided to not approve the two long weekends per annum proposal and I have decided to also provide that the week in Sydney, Australia, should occur during the first week of each school term holiday and not later than mid-January in the summer school holiday. This will somewhat reduce the impact of any sudden suspension of travel by reducing her absence from school by at least one week.

[34] The orders that follow also require her to be returned to New Zealand no later than 14 January in the summer school holidays, thus providing a longer "buffer" period should restrictions be imposed while she is in Australia.

Orders

[35] A guardianship direction is made permitting [Lily] to travel out of New Zealand to Australia for the purposes of contact with her father for the periods provided for in the interim contact order that follows subject to the condition that he first provide the other parties and lawyer for child by email with a photocopy of [Lily]'s current passport(s).

[36] [Lily]'s place of habitual residence is confirmed as being Auckland, New Zealand.

[37] An interim contact parenting order is made providing for [Lily] to spend up to one week of each school holiday period in the care of her father in Australia subject to the following terms and conditions:

(a) Excepting July 2021, the one-week visit is to take place during the first week of each of the April, July and October school term holidays and is to take place in the summer school holidays provided she is returned to New Zealand no later than 14 January.

(b) The father is to provide the other parties and lawyer for child with the following information no later than two weeks prior to [Lily]'s travel to Australia:

(i) Confirmation of the specific dates of travel and copies of the airline ticketing;

(ii) An itinerary for any period that [Lily] will be residing away from her father's home in Sydney.

(c) In the event that the current COVID-19 restrictions on travel to, and from, New South Wales are lifted prior to 11 July, [Lily] may have the second week of the school holiday with her father and the notice period

for confirmation of ticketing (and itinerary if relevant) shall be reduced to 24 hours.

Signed at Auckland this 6th day of July 2021 at 2.50 pm.

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Judge TH Druce
Family Court Judge

Date of authentication: 06/07/2021
In an electronic form, authenticated electronically.