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

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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2020-075-000083
[2024] NZFC 400

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[EBONY CARTER] Applicant
AND	[FREDERICK HINES] Respondent

Hearing:	17 January 2024
Appearances:	A King for the Applicant P Bromiley for the Respondent J Niemand as Lawyer for the Children
Judgment:	26 January 2024

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO S 139A LEAVE TO APPLY APPLICATIONS]

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[1] Ms [Carter] and Mr [Hines] are the parents of [Jordan Hines], born [date deleted] 2006, and [Brook Hines], born [date deleted] 2018. There has effectively been constant litigation in relation to these children for the last four years.

[2] On 3 July 2023 Ms [Carter] filed:

(a) An application for a Parenting Order (ss 48 and 49, Care of Children Act 2004) ("COCA").

(b) An application to relocate with the children to [location 1] (s 46R, COCA).

(c) An application relating to the children's future schools (s 46R, COCA).

(d) An application to enrol the children at a medical centre in either [location 1] or [location 2] (s 46R, COCA).

[3] The Court had previously made a Final Parenting Order on 6 January 2022, and at the same time dismissed Ms [Carter]'s application to relocate with the children to either Australia or [location 1] (a s 46R – dispute between guardians – application).[1] Additionally, s 46R orders were made in relation to [Jordan] and [Brook]'s education; an order relating to [Jordan]'s primary school was made on 24 January 2022[2] and an order in relation to [Brook]'s pre-school was made on 20 July 2022.[3]

[4] Thus, the July 2023 applications[4] were filed, on the face of it, within two years of the making of a Parenting Order, and orders relating to guardianship disputes. Leave to commence proceedings was therefore required by Ms [Carter] pursuant to s 139A(1) of COCA. No application for any such leave was in fact filed. However, Mr Niemand, [Jordan] and [Brook]'s counsel, pointed out the need for leave and pursuant to a joint memorandum of all counsel dated 7 September 2023, all counsel

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1 *[Hines] v [Carter]* [2021] NZFC 13112.
2 *[Hines] v [Carter]* [2022] NZFC 555.
3 *[Carter] v [Hines]* [2022] NZFC 7016.
4 Referred to at [2] above.

agreed that the issue of leave needed to be determined and to be set down for hearing. The granting of leave is opposed by Mr [Hines]. Thus, I need to determine:

(a) Whether to grant leave to Ms [Carter] to commence her proceedings for a Parenting Order.

(b) Whether to grant leave in relation to any of the s 46R applications that Ms [Carter] seeks to file with the Court.

Procedural Issues

[5] The applications filed by Ms [Carter] have been accepted for filing by the registry. However, s 139A(1) of COCA states that:

> A proceeding (a **new proceeding**) may not be commenced under section 46R, 48, or 56 without the leave of a Family Court Associate or Family Court Judge…

[6] Proceedings are commenced upon filing. Rule 19 of the Family Court Rules 2002 states that for the purpose of the rules, proceedings are commenced when a person makes an application to the Court for an order or declaration under a family law Act. Subsequently, r 20 of the FCR states that an application is made by filing the relevant documents set out in r 20. Therefore, the FCR makes it clear that a proceeding is commenced upon the filing of the specified documents, meaning that new proceeding has been commenced upon the filing of an application.

[7] It appears to be registry practice that when a s 139A application is filed, the substantive application[5] is also accepted for filing and entered into CMS.[6] However, a plain English reading of s 139(1) indicates an express intention by Parliament that a proceeding cannot be commenced (filed) unless leave has been granted by a Judge. Thus, in some Courts, notwithstanding that the s 139A leave issue has not been determined, proceedings are accepted for filing, are judicially triaged,[7] and lawyer for

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5 For a Parenting Order, an order varying a Parenting Order, or an order relating to a dispute between guardians.

6 The Ministry of Justice's Case Management System.

7 Rule 416P, Family Court Rules 2002.

the children appointed in relation to those proceedings. That cannot be correct; for until such time as leave to commence proceedings has been granted, there are no proceedings capable of triage, and no substantive proceedings in relation to which lawyer for child could be appointed pursuant to s 7 of COCA. Section 7(1) requires the existence of a proceeding before the Court can appoint lawyer for the child. There are no proceedings unless s 139A leave has been granted.

[8] Rather, I suggest the correct approach is to accept the applications for filing on the basis that they are indicative of the applications that would be filed if leave is subsequently granted pursuant to s 139A.[8] But I suggest that those indicative proceedings should not be entered by the registry into CMS as a filed application until and unless leave is subsequently granted; the only application that should be granted is the s 139A leave application. If a decision is made to appoint lawyer for the child upon the filing of a s 139A application, then it can only be to represent the views/ welfare and best interests of the child in relation to the s 139A application, and not in relation to the new indicative proceedings unless and until leave to commence those proceedings is subsequently granted. The appointment of lawyer for the child on that limited basis is consistent with s 4(1)(a) which requires the Court to have as its paramount consideration the welfare and best interests of a child "in the administration and application of this Act, for example, in proceedings under this Act". Arguably, a s 139A application would also, tangentially, be "any other proceedings" relating to the role of providing day-to-day care or involving the guardianship of a child.[9] That approach also reflects Article 12 of the United Nations Convention on the Rights of the Child ("UNCROC"), now expressly enacted pursuant to s 6(1AAA) of COCA.

[9] Consequently, the time for a respondent to file his or her notice of response should not commence until such time as leave has been granted by the Court.

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8 Or alternatively, if pursuant to s 139A(4), all parties consent to the commencement of the new proceedings.

9 Section 4(1)(b).

Background

Section 139A of COCA is easily applicable in a simple case where an order is made in relation to a discreet issue at a defined point in time. This case highlights what I suggest is a common scenario in which different and final orders are made in relation to children at different times, and therefore an issue arises as to when the two year period referred to in s 139A(1)(b) of COCA commences. What this case also highlights is a relatively common issue whereby the Court makes a Final Parenting Order, and then subsequently, on a without notice basis, an Interim Parenting Order is made effectively varying or suspending the first and Final Parenting Order that was made.[10] If, as occurred in this case, the application for an Interim Parenting Order is not pursued, then the question arises as to whether leave commences from the date at which the first order was made, or at the date upon which the interim applications were disposed of; either by discontinuance, dismissal, or the making of a further order.

[10] In this case, on 6 January 2022 his Honour Judge Blair issued a reserved judgment following a five day hearing. Of relevance to these proceedings, pursuant to his Honour's judgment a Final Parenting Order was made.[11]

[11] Then pursuant to a chambers decision made by Judge Blair on 24 January 2022, an order was made that [Jordan] was to attend [school A] in [location 2].[12] On 23 February 2022 Mr [Hines] applied pursuant to s 68 of COCA for orders relating to the contravention of the Parenting Order. On 7 March 2022 Ms [Carter] applied without notice for an order relating to [Brook]'s pre-school. No s 139A leave application was filed; leave should have been sought. Judge Geoghegan in his minute of 15 March 2022 referred to necessity of leave and therefore the necessity of a decision needing to be made pursuant to s 139A. However, in a chambers boxwork minute of 5 May 2022 Judge Blair recorded that Mr [Hines] no longer opposed leave being granted, and his Honour accordingly granted leave to commence proceedings by consent.

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10 More often than not with interim s 139A leave being granted, although at times the necessity of leave is overlooked.

11 Note 1 above.

12 Note 2 above.

[12] Pursuant to an oral judgment of her Honour Judge Cook on 20 July 2022 her Honour determined, in relation to Ms [Carter]'s s 46R application relating to [Brook]'s pre-school, that [Brook] was to attend [daycare] in [location 2].[13] The s 68 application was heard by Judge Cook on 6 October, and pursuant to her Honour's reserved judgment of 10 October her Honour determined that Ms [Carter] had breached the Parenting Order, and then pursuant to s 68(1)(b) of COCA, her Honour varied the 6 January 2022 Parenting Order, although not significantly.

[13] On 8 February 2023 Ms [Carter] sought and obtained on a without notice basis leave pursuant to s 139A and an interim order varying the Parenting Order. Judge Grimes varied the Parenting Order by suspending it until the subsequent directions conference. There were allegations at that time that Mr [Hines] had abused one or both of the girls. Those allegations subsequently proved to be entirely without foundation.

[14] While those applications were before the Court, Ms [Carter] filed the applications referred to at [1] above; I note she applied for a Parenting Order notwithstanding she already had an Interim Parenting Order, in relation to which leave had been granted, at that point in time. Again, no leave applications were filed in support of these new applications; it appears that Ms [Carter] routinely ignores the provisions of s 139A.

[15] Then pursuant to a memorandum dated 7 September 2023 Judge Cook made the orders and directions sought by all counsel, namely:

(a) An order discharging the interim variation order dated 8 February 2023 (the order made by Judge Grimes suspending the January 2022 Final Parenting Order).

(b) A direction that a hearing be vacated (as it was no longer required).

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13 Note 3 above.

(c) The allocation of this one hour submissions only hearing in relation to the s 139A leave issue (that is, the hearing which was finally heard before me some four months later).

(d) Recording that if leave was granted, then further directions would be sought.

[16] Thus, on the face of it, a Final Parenting Order was made in January 2022, it was revisited by being suspended on 8 February 2023, and was then reinstated on 11 September 2023 when Judge Cook made the orders as sought pursuant to her boxwork memorandum. I raised with counsel, therefore, the question of whether Judge Cook's decision on 11 September 2023 was the date at which "the final direction or order was given" in relation to the proceedings.[14] That is, did the two year period now commence on 11 September 2023?

[17] Mr Niemand helpfully pointed out paragraph [1.4] of the joint memorandum of counsel dated 7 September 2023 in which counsel recorded that there were the outstanding July 2023 applications, in relation to which s 139A leave needed to be determined. While arguably it is open for me to determine that a final determination was made in September 2023, I determine that it would be unjust to do so given the clear intention of counsel set out in the joint memorandum referred to above.

Should leave be granted to commence proceedings for a new Parenting Order?

[18] In relation to the leave issue all counsel have filed written submissions which I have read and carefully considered. Ms Bromiley and Mr Niemand both addressed the relevant legal issues. Ms King's submissions were really centred in the concept of pragmatic fairness. The difficulty with her submissions is that they are in conflict with the express legal provisions in COCA.

[19] Both Ms Bromiley and Mr Niemand in their written submissions pointed to the variations made by Judge Cook to the 6 January 2022 Parenting Order, made by her Honour on 11 October 2022. However, as Ms King pointed out in her oral

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[14] Care of Children Act 2004, s 139A(1)(b).

submissions, her Honour's variation of the Parenting Order was in response and pursuant to s 68(1)(b) of COCA by way of remedy to Mr [Hines]'s successful admonishment application.

[20] Section 139A(1) requires leave to commence a proceeding for a Parenting Order, a variation to a Parenting Order, or a s 46R dispute between guardians. Leave is required if the new proceeding "is substantially similar to a proceeding previously filed in the Family Court by any person (a previous proceeding)".[15]

[21] A new proceeding which is substantially similar to the previous proceeding is defined in subs (3) and pursuant to subs (3)(c) a variation order made pursuant to s 68 is not caught by s 139A. A variation to a Parenting Order pursuant to s 68, on the face of it, allows a party to circumvent s 139A. It is not clear whether a variation in response to a s 68 application can be a wholesale variation (for example, changing day-to-day care), or only narrow and more nuanced variations such as those made by Judge Cook in this case. I suggest that the variations should be more in the nature of "tinkering" rather than a wholesale revisiting of the care/contact arrangements; to adopt a "wholesale revisiting" approach would be an unjustified and unlawful attack on the clear intention of Parliament in s 139A to limit the filing of further applications within two years.

[22] Thus, as Mr Niemand submits, the variation order made by Judge Cook pursuant to s 68 is not a final direction or order made in the previous proceedings as is required pursuant to s 139A(b) of COCA. Ms Bromiley accepted this upon reflection. I agree with Mr Niemand's assessment. Therefore, I determine that the date on which the two year period commences, is the date on which his Honour Judge Blair made the Final Parenting Order, namely 6 January 2022.

[23] Leave can be granted if Ms [Carter] is able to satisfy the Court that there has been a material change in circumstances of either herself, Mr [Hines], or either of the children. In Ms King's submission the material changes in circumstances that Ms [Carter] relies upon are that:

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15 Section 139A(1)(a).

(a) She is in a committed relationship with someone who lives in [location 1]; and

(b) She has the opportunity of employment, and therefore she needs to move with the children to [location 1].

[24] However, as Ms Bromiley pointed out those were the central issues in the hearing before Judge Blair. There is simply no evidence before me to satisfy me that there has been a material change in circumstances.

[25] Accordingly, if this Leave hearing had occurred before 6 January 2024, I would have declined leave to commence the new Parenting Order application as there is simply no jurisdiction in which to grant leave. However, the hearing before me occurred on 17 January 2024. It would be frankly churlish of the Court to decline leave to file an application now on the basis that Ms [Carter] could simply turn around and refile the exact same application. For purely pragmatic reasons therefore I make an order granting leave for Ms [Carter] to commence her June 2023 application for a Parenting Order.

Should the applications for leave to apply for orders pursuant to s 46R of the Care of Children Act be granted?

[26] The issues in relation to resolution of this question are more complex.

[27] As set out above there are three applications filed by Ms [Carter] pursuant to s 46R of the Care of Children Act. They relate to her proposed relocation of [Jordan] and [Brook] to live in [location 1], and depending on the outcome of that application, what school they will attend, and what medical centre they are going to be enrolled in

[28] On 24 January 2022 Judge Blair made an order in relation to [Jordan] that she was to attend [school A].[16] At the same time his Honour noted that Ms [Carter] was no longer pursuing an order seeking a change in pre-school for [Brook].[17]

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16 *[Hines] v [Carter]* [2022] NZFC 555 at [26].
17 At [4].

Subsequently, her Honour Judge Cook determined, in relation to [Brook], that she was to attend a pre-school in [location 2].[18] On the face of it, the two year period under s 139A therefore runs from 10 October 2022.

[29] Ms [Carter]'s current s 46R applications, in which she seeks leave to commence those proceedings, are orders that on the face of it are incidental and necessary to her application for a Parenting Order. That is, she is wanting a Parenting Order in which [Jordan] and [Brook] are in her day-to-day care, and given the previous orders of the Court, that requires her to obtain a s 46R order to allow her to relocate the children to live in [location 1], for them to attend new schools and to be enrolled in a new daycare centre. Ms [Carter] has not applied to vary either of the earlier s 46R orders, or to discharge them.[19] Thus, in terms of s 139A Ms [Carter]'s fresh s 46R applications are new proceedings that are commenced under the same provision of COCA as the previous proceedings (s 46R). Leave therefore can only be granted pursuant to s 139A(2) if there has been a material change in the circumstances of either party or the children. For the reasons set out above, there is simply no evidence of any material change in circumstance. On the face of it, therefore, leave should be declined for Ms [Carter] to commence her applications under s 46R.

[30] As Mr Niemand points out in his submissions, a strict literal interpretation of s 139A(3)(c)(i) means that s 139A leave is required if any s 46R application between the same parties involving at least a same child is brought within two years after an earlier s 46R application between the same parties involving at least the same child has been disposed of. Mr Niemand posits an example, whereby two parents have a dispute about a medical matter concerning their child. Proceedings are filed, a hearing takes place, and the Court makes an order pursuant to s 46R resolving a medical dispute. However, six months later disputes arise about which school the child should attend when they turn five, proposed overseas travel, and the child's involvement in either of the party's religious practices.

[31] Absent consent, a strict reading of s 139A(3)(c)(i) would preclude an application being brought under s 46R in respect of any of these new matters, given

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18 *[Hines] v [Carter]* [2022] NZFC 10350 at [26] and [29].
19 Therefore, s 139A(3)(c)(ii) and (iii) do not apply.

the making of a final order and the previous s 46R dispute and these being proceedings commenced again under s 46R of COCA.

[32] It is arguable that the subsequent disputes in Mr Niemand's example did not exist when the first s 46R order was made. However, that is no answer to the intention behind s 139A to prevent litigation as an inevitable consequence of a dispute unless a material change in the circumstances of either party, or the child is identified. To allow a new dispute to simply constitute a material change in circumstance would be to lower the threshold created by s 139A and render the s 139A threshold meaningless. As Mr Niemand puts it in his submissions, it would be akin to removing the s 139A gate from the Court's door and replacing it with a welcome mat.

[33] Mr Niemand's example and analysis is directly applicable to this case. For while the relocation and schooling issues have been the subject of previous s 46R orders, the issue around the children's enrolment with a medical practitioner has not. Remarkably, it appears that the application of s 139A(3)(c)(i) has not arisen in the context of any other proceedings, and I have been unable to find any other cases directly on point.

[34] Section 139A was introduced by the Care of Children Amendment Act (No 2) 2013. The Care of Children Amendment Bill (No 2) 90-3A was separated from the Family Court Proceedings Reform Bill on 18 September 2013. There does not appear to be any available Hansard Debates, reports or submissions or advice readily ascertainable in relation to the Care of Children Amendment Bill (No 2) 90-3A. Of the available Hansard Debates regarding the Family Court Proceedings Reform Bill, there appear to be no mention of the proposed s 139A. Thus, there does not appear to be any clear guidance that could be gleaned from the Parliamentary Debate at the time of the passing of the Bill as to what Parliament's intention was behind s 139A.

Purpose of s 139A

[35] The purpose of s 139A is to prevent continual, repeated and unnecessary litigation issues affecting children.[20] In *Border v Tokoroa*, his Honour Judge de Jong stated that:[21]

> [p]resumably Parliament felt a need for this kind of filter to guard against parties repeatedly filing unnecessary or unmeritorious applications regarding children.

[36] Judge Russell in *Pidgeman v Oliver* stated that:[22]

> Section 139A was an amendment brought into the Care of Children Act to prevent continual and repeated litigation for issues affecting a child or children. The intention was that once a Parenting Order [or a s 46R order] is made by the Court, which first satisfies itself the…arrangements are in the welfare and best interests of the child, there should be a two year period following in which the parties need to get on and make the…arrangements work.

[37] Those two decisions therefore recognise that the purpose of s 139A is the prevention of vexatious litigants making repeated and unnecessary applications regarding children. Those cases however do not resolve the question of whether s 139A leave is required when a subsequent s 46R application is made in relation to a new and discreet issue, notwithstanding that previous s 46R orders have been made in the preceding two years. The obvious example is that offered by Mr Niemand; a party has a new opportunity of travelling overseas with the children for a holiday, and the other parent does not agree. On the face of it, s 139A(3)(c)(i) would appear to preclude such an application being made.

[38] However, Mr Niemand submits there is an alternative approach. That is, to interpret s 139A in light of the overall language, intention and purposes of COCA. In his submission COCA needs to be interpreted not only from the text, but also in light of its purpose.[23] He references the learned authors Burrows and Carter who state that if a purely grammatical construction of a statutory provision does not give effect to the evident purpose of the provision, the Court should search for a construction that

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20 *Pidgeman v Oliver* [2015] NZFC 6585 at [14].
21 *Border v Tokoroa* [2014] NZFC 10947 at [26].
22 *Pidgeman v Oliver* above n 12, at [14].
23 Legislation Act 2019, s 10(1).

does give effect to that purpose.[24] In Burrows and Carter reference is made to the decision of *McKenzie v Attorney-General* where Cooke J referenced:[25]

> …the general principle of statutory interpretation that strict grammatical meaning must yield to sufficiently obvious purpose.

[39] Additionally, Mr Niemand references the Court's obligations to be compliant with international treaties, and in particular UNCROC, which includes the rendering of "appropriate assistance" to parents in meeting their duties to children.[26]

[40] Finally, with reference to Burrows and Carter, Mr Niemand submits there is precedence for the extreme step of substitution of words by the Court, to avoid absurdity or where it is quite clear from the scheme and purpose of the legislation that such reading is necessary to make the Act work as intended.[27] Thus, in Mr Niemand's submission the "absurdity" that arises and that occasions the need for substitution of words to give effect to the purposes of COCA, is that s 139A appears to assume a universal similarity between all applications arising under s 46R, and its literal application results in a dispute about medical matters being seen as "substantially similar proceeding" to a dispute about relocation, education or religious matters.

[41] Thus, in Mr Niemand's submission an option for the Court is to read the word "is" in s 139A(3) as requiring the substitution of the words "may be"; thus, s 139A(3) in his submission should be deemed to read in the section "new proceeding **may be** substantially similar to a previous proceeding if…". Additionally, and specifically with reference to s 139A(c)(i), in his submission there should be the addition of the words "in respect of the same subject matter, thus the provision would read "is commenced under the same provision of this Act to the previous proceeding **in respect of the same subject matter**".

[42] I disagree with Mr Niemand's submission. Firstly, the word "is" does not only appear in s 139A(3), it also appears in s 139A(1)(a), (b), (c)(i), (ii) and (iii). It would

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24 Ross Carter *Burrows and Carter Statute Law in New Zealand*, (6th edition, LexisNexis, Wellington, 2021) at 294.
25 *McKenzie v Attorney-General* [1992] 2 NZLR 14 (CA).
26 Article 18(2).
27 At 406.

be nonsensical to read the word "is" in s 139A(3) as meaning "may be", but not in other subsections of s 139A.

[43] Secondly, the principle of substitution would have unintended consequences. While it would allow for the filing of a new s 46R application, without the necessity of s 139A leave being required, in respect of a different subject matter, it would also afford the opportunity for vexatious litigants to engage in litigation abuse. That is, the vexatious litigant could file a s 46R application in relation to schooling, have that determined by the Court, and then file a s 46R application in relation to an overseas travel, followed by a s 46R application in relation to vaccination issues, and so on.

[44] Thirdly, whilst the blunt wording of s 139A(c)(i) appears to have an unintended consequence of precluding a legitimate subsequent s 46R application being filed, it is for Parliament to amend the legislation, and not for the Courts to interpret that legislation in a manner which is inconsistent with the express wording of the legislation enacted by Parliament. Courts should never undermine the express intention of Parliament express in legislation.

[45] Finally, leave would be granted if there was a material change in circumstance. Thus, for example, where a s 46R application was determined in relation to schooling, a subsequent s 46R application where a child became unwell and there was a disagreement about treatment would amount to a material change in circumstance as that circumstance would not have existed at the time the original order was made. The risk is that there would be judicial "temptation" to apply the concept of a "material change in circumstances" liberally to circumvent the s 139A(3)(c)(i) restrictions. But to do so would be to undermine the intention in the statute, and would again be akin to removing the s 139A gate from the Court's door and replacing it with a welcome mat. On the facts of this case, as already pointed out, there simply is no evidence of a material change in circumstance.

[46] It is my determination that s 139A(c)(i) should be interpreted literally, and consequently where a decision has been made in relation to an application under s 46R, no subsequent s 46R application can be accepted for filing and be commenced, except with leave of the Court, even if it is in relation to a discreet and separate issue. Leave

can only be granted if there is an evidential foundation to show a material change in circumstances.

[47] The last s 46R decision was made by Judge Cook on 10 October 2022. Therefore, Ms [Carter] cannot file any new applications under s 46R until 11 October 2024 unless leave is granted to commence these new proceedings. In the absence of any evidence to enable me to conclude that there has been a material change in circumstance, I decline her leave to commence proceedings pursuant to s 46R, and those applications are accordingly not accepted as having been filed. They are applications which should never have been filed, and that Ms [Carter]/Ms King filed these applications without an accompanying application for leave is inexplicable. The pragmatic approach suggested by Ms King in her submissions was inconsistent with the express wording of the section and the law.

The Result

[48] As a consequence, I make the following orders and directions:

(a) I grant leave for Ms [Carter] to commence proceedings in relation to her new application for a Parenting Order.

(b) I decline leave to commence proceedings in relation to the three s 46R applications filed by Ms [Carter] and they are to accordingly be removed from the Court file.

(c) Having granted leave to commence proceedings in terms of the parenting application, the time now commences for Mr [Hines] to file his notice of response. I direct that the proceedings are to proceed on the standard track, and direct the registrar allocate an issues conference on the next reasonably available date. I further classify the proceedings as complex and direct that wherever practicable they are to be case managed by me.

(d) Mr Niemand's appointment as lawyer for the children is extended to include his appointment in relation to the new application for a Parenting Order.

S J Coyle
Family Court Judge

Signed this 26th day of January 2024 at am / pm