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

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IN THE FAMILY COURT
AT PALMERSTON NORTH

I TE KŌTI WHĀNAU
KI TE PAPAIOEA

FAM-2019-054-000043
[2023] NZFC 8162

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[DONNA WADE] Applicant
AND	[BRIAN WADE] Respondent

Hearing:	28 July 2023
Appearances:	C LaHatte for the Applicant T Whelan for the Respondent C Davidson as Lawyer for Child
Judgment:	31 July 2023

RESERVED JUDGMENT OF JUDGE J F MOSS
[Leave to commence proceedings]

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[1] In 2019, when the boys had not been in New Zealand for long, Family Court proceedings related to their care commenced.

[2] The proceedings have continued since. Prior to their arrival in New Zealand the boys had been subject to years of litigation in various states in USA. The litigation began when [Milton], the younger child, was about two.

[3] The Court made a final parenting order in June 2022 after many variations of orders and extensive work to repair the boys' relationship with their mother. The Court's judgment (August 2021) details the reasons for the boys being in the day-to-day care of their father, and having contact with their mother which could be increased at the father's discretion.

[4] In March 2023 the mother sought leave to apply for a variation of the order of June 2022. In April 2023, the mother applied for orders preventing the boys from leaving New Zealand, which was styled as an application for a border alert. As a matter of the Court's process, the only way to create an administrative action to manage the movement of children outside of New Zealand is to seek or to hold an order preventing their removal from New Zealand.[1]

[5] The matter of the children's relocation had become the focus upon which the leave question was ultimately conceded. However, matters became unexpectedly more conflicted during a judicial conference on 3 July. The parents' consent appeared to have been given at that point, and that would have obviated the need for leave.[2]

[6] During the judicial conference on 3 July, the mother's apparent consent to the relocation, upon which the father's consent to leave being granted for the variation rested, appeared to waver. The mother had sworn an affidavit confirming her consent on 30 June 2023. She said: "I have reluctantly decided to agree to the boys relocating back to the USA with their dad, and I plan to move back too".

[7] The mother also sought to file evidence from a mediator and conflict resolution professional in Auckland (Ms Goldson) in which Ms Goldson offered the opinion that there was clear evidence that the boys were being actively alienated from their mother by their father. The mother reasserted in her affidavit of 30 June that she believed that active process was continuing.[3]

[8] On 22 May, the father had applied for a direction that the children be permitted to be relocated to [state 1], USA, and be in enrolled in named schools there. In the

[1] Care of Children Act 2004, s 77(3)(c).
[2] Section 139A(4).
[3] Affidavit of [Donna Wade], 30 June 2023, para 6.

course of that application, and predicated upon it being successful, the father sought a variation to the parenting order, on the basis it would apply in [state 1], USA.

[9] At that point, the father required leave to make the application for variation of the custody order. The matter came before the Court on 3 July, having suffered a delay because I was ill on the first allocated date being 6 June 2023. In the court record on that day, I recorded: "Leave to apply for a parenting order is granted by consent of the parties". I made a number of other directions related to filing of evidence, enrolment in school, the mother's request to tell the boys of her decision that she had given permission to move. I recorded that the matter of variation of the parenting order was to be allocated a hearing before me on 18 August.

[10] At that point, the father agreed to discontinue his application for variation of the parenting order, which he subsequently did. In combination, the evidence of the mother quoted above as to her consent for relocation, and her behaviour while attending court caused me to reflect on the question of leave. My minute, dictated on 3 July and signed on 4 July, I recorded that I doubted the propriety of leave being granted, because of the toxic impact of litigation on these children. The mother's application from March was unrelated to the relocation. She sought wide variation of the order, in terms which left no doubt that the conflict between the parents was continuing to skew the focus of the matter away from the children. The precipitating action, prior to the application being filed appears to have been that the father proposed to change the contact arrangements, as he was permitted to under the order, in order to fit in the boys' rugby during the winter rugby season. The fact that there was a conclusive statement of the father's decision delivered in rigid terms, and that mother immediately applied to the Court for a variation is telling in terms of the ongoing conflict.

[11] However, the previous year I had determined, and set out the reasons in detail in my decision of August 2021 that I considered the adversity of the litigation was such, for the boys, that a mechanism for resolving the litigation was required.[4] I considered that mechanism was to permit the father to manage increases in the contact.

[4] *[Wade] v [Wade]* [2022] NZFC 5482.

The mother took issue with the father's responsible exercise of that discretion, and it is upon that basis that she sought leave.

[12] The message related to the rugby season was not a message about reducing contact for good. It related to reducing the duration of contact visits during the rugby season.

[13] The mother linked the reduction in contact to her declining to pay court costs which were awarded against her after the litigation in June 2022. The father's message, in that regard, was sent on 3 January. He wrote:

> In the email below we wrote about settling the outstanding court ordered costs awards. We also sent a similar email to your lawyer regarding this issue but have not heard from him either. Where do you stand on this matter? Are you going to abide by the court order or will you disregard it?
>
> We find it very hard to work with you and your many requests when you do not abide by the court orders. We are left with no choice but stick strictly to the parenting order from the Court. It is unfortunate, and certainly not in the boys' best interest, that you refuse to resolve these outstanding legal issues and court orders. We will be unable to move forward with any certainty or speed unless you do settle the debts.
>
> We look forward to hearing from you or Chris [counsel] regarding this matter. Hopefully you are willing to resolve the outstanding cost orders so that we can move forward without this issue obscuring the way ahead.

[14] The mother represented the reduction in contact related to the rugby season to the father's reduction in contact. It does not appear to me to be related in time or in expression at all.

[15] At the time of the application being made, the mother sought to vary the order because she disagreed with it, and because she disagreed with the foundational premise that the father would have the discretion to adjust contact times. Two months later, the father applied for relocation, and to vary the parenting order, on the basis that plans needed to be made for contact in the USA.

[16] At the time when leave was first considered by the Court, lawyer for the boys, Ms Davidson, recorded her opposition to the leave being granted. Ms Davidson recorded in her memorandum of 22 May, at which time she was appointed on the

variation application filed by the mother but not on the range of applications filed by the father.[5]

[17] In her memorandum, Ms Davidson said this:[6]

> 15. I anticipate the Court will need to determine the children's place of residence through a defended hearing.
>
> 16. If the children are ordered to remain in New Zealand in Mr [Wade]'s care, the issue of leave becomes very relevant. On behalf of the children, I would not consent to leave to vary the parenting order in this circumstance.
>
> 17. I understand that New Zealand parenting orders are not able to be registered in America. I the Court finds the children should return to America, any parenting order would cease to have any affect and as such the variation application becomes a moot point.
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> 18. I suggest the issue of the children's place of residence needs to progress towards a hearing as soon as possible. The boys are aware that this issue is "on the table" and are anxious to know what is going to happen. The issue is impacting their perceptions of their mother even further and I anticipate will likely flow onto the contact that is currently taking place.

[18] Although the parents recorded their consent to leave being granted in court, before me, on 3 July, I did not include in my consideration the opposition of lawyer for the boys to the grant of leave.

[19] The issue before the Court is, therefore, whether the record of consent by the parents pursuant to s 139A(4) requires the Court to hear the application, because leave is not required, or whether the Court retains a discretion to consider leave with or without the parents' consent. Inherent in this question is the Court's obligations to exercise its powers under the Care of Children Act, at all times, in terms of the welfare and best interests of the children. Section 4 of the Care of Children Act defines the Court's power to act in this way:

> **4 Child's welfare and best interests to be paramount**
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> (1) The welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration—
>
> (a) in the administration and application of this Act, for example, in proceedings under this Act; and

[5] The two sets of documents were filed on the same day.
[6] Report of lawyer for child, 22 May 2023, paras 15-18.

(b) in any other proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child.

(2) Any person considering the welfare and best interests of a child in his or her particular circumstances—

(a) must take into account—

(i) the principle that decisions affecting the child should be made and implemented within a time frame that is appropriate to the child's sense of time; and

(ii) the principles in section 5; and

(b) may take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests.

(3) It must not be presumed that the welfare and best interests of a child (of any age) require the child to be placed in the day-to-day care of a particular person because of that person's gender.

(4) This section does not—

(a) limit section 6 or 83, or subpart 4 of Part 2; or

(b) prevent any person from taking into account other matters relevant to the child's welfare and best interests.

[20] Any exercise of power by the Court must be done promoting the welfare and best interests of the children.

The mother's submissions

[21] Counsel for Ms [Wade] submitted in the alternative that the matter of leave had been decided, because both parties communicate their consent, and therefore leave was not required. In the alternative, Mr LaHatte submitted that the matter of relocation is a material change and it is contrary to the boys' best interests not to address that material change for the period prior to their move to their home country, United States of America. Inherent in the first submission is that consideration of the children's best interests may not infer consideration of whether litigation recommences. In the second submission, Mr LaHatte relies on the relocation as a material change in circumstances. He has relied in submissions on s 4.[7]

[7] Submissions of Mr LaHatte, 24 July 2023, para 15.

[22] Mr LaHatte canvassed the cases related to the test of materiality and quoted the Court in *Pidgeman v Oliver*:[8]

> The purpose and intention of section 139A has been commented on by various Judges since its inclusion but has been effectively summarized by Judge de Jong in *Border v Tokoroa* [2014] NZFC 10947, [2015] NZFLR 832: "Presumably Parliament felt a need for this kind of filter to guard against parties repeatedly filing unnecessary or unmeritorious applications regarding children" and Judge Russell in *Pidgeman v Oliver* [2015] NZFC 6585: "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 is made by the Court, which first satisfies itself the care 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 care arrangements work."

[23] Mr LaHatte confirmed that the onus rests on the person seeking leave.

[24] In support of Mr LaHatte's primary submission, he quoted the Court's minute of 4 July in which I linked welfare and best interests to the question of leave. He submitted that because pursuant to s 139A(4) leave is not required, whether the Court had concerns about the grant of leave or not is irrelevant.

The father's submissions

[25] The father opposes the grant of leave. In written submissions, counsel for the father did not address Mr LaHatte's primary submission, but focused on materiality. Inherent in the submissions is an absence of consent to the grant of leave. In oral submissions, Ms Whelan submitted that Mr [Wade]'s consent was given on the basis that he did not know if the mother was relocating, and that his consent to new proceedings was for a limited purpose.

[26] As to whether the matter is a material change, Ms Whelan submitted that it is not, that the order cannot bind the American Courts, that the order cannot be registered in America and the focus of the variation is, therefore, limited to the period of time until the agreed relocation on 1 November 2023.

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[8] Submissions of Mr LaHatte, 24 July 2023, para 17 citing *Pidgeman v Oliver* [2015] NZFC 6585.

The case for the children

[27] Ms Davidson, as counsel for [Milton] and [Colby] submitted that s 139A is subject to the principles of the Act and where, as here, the continuing litigation perpetuates the adversity for the children it should not be granted. The contrast may be made, relying on the commentary in Westlaw, related to why leave is not required where there is parental consent. That commentary is quoted by counsel for Ms [Wade], but is, in my view, entirely applicable to the proposition that s 139A must be subject to the principles of welfare and best interests. The Westlaw commentary on s 139A(4) provides as follows:

> Section 139A does not apply if the parties consent to the application: s 139A(4). It may be that both parties want arrangements for care and contact revisited by the court. In such event a consent memorandum signed by both parties or their legal representatives should be filed with the application. Judge de Jong in *Border v Tokoroa* [2014] NZFC 10947; [2015] NZFLR 832 at [31] suggested that the reasoning behind s 139A(4), by which the parties can by agreement bypass the need to obtain leave of the Court, was to "save precious time and resources when there has been such a significant change in circumstances that it is blindingly obvious to the parties that there is a need to review their last order even though it was made within the last two years. It is curious that the legislature has determined that, if all parties agree, leave must be granted without any analysis of whether the orders sought are "substantially similar" to a previous proceeding or whether there has been a "material change of circumstances.

Conclusion

[28] The Court's obligation in the administration of the Care of Children Act, as in any other statute is to find a purposive interpretation, if that is not contrary to the plain meaning of the text. Consent is well regarded as something which can be given and retracted. Once the purpose for which a consent is given is spent, it is available to a party to withdraw the consent.

[29] The grant of leave, for the purposes as set out above in Westlaw, has been regarded by the Court as available where parental cooperation is displayed in adjusting orders for children's arrangements after a period of consultation or agreement. Considering Judge de Jong in *Border v Tokoroa*, and the text of s 139A, the matter of parental consent is properly considered in relation not to an application itself, but to

the outcome.[9] The text of the subsection refers to consent to the commencement. However, bearing in mind that a party consenting to the exercise of a power under the Care of Children Act is similarly bound by s 4 of the Care of Children Act, inherent in the consent, particularly where parties are advised by counsel. It is necessary to interpret the question of consent by parties as being a consent which promotes the best interests of the children. Both in the context of s 5 principles which contribute to best interests (the need for parents to make their own arrangements) and also in substantive the consideration of welfare and best interests, underpinning consent or, where circumstances which plainly dictate the need for a revision of orders, a consideration of the materiality of the change in circumstances is required. It is artificial to impose upon the Court an obligation when exercising a power under the Care of Children Act to act in the best interests of the children, but to excuse parents from acting in that way.

[30] At the time the mother applied for leave, as she had to, the application was not related to a relocation. The later imposition of a relocation question cannot be considered in terms of the materiality question or the best interest question. The Court is reliant on the views of the children themselves, and on the best interest analysis proffered by their counsel. At the time the father's applications were made, the variation sought by the mother, based as it was on continuing conflict and disagreement with the previous order, a consent to the grant of leave by the father could not have been in the best interests of the children. His consent was, I accept, based as his counsel submitted on the need for variation if the relocation were permitted, and the mother did not also return to USA. That has remained the position, and, thus, I do not consider that the father may not revoke his consent. There will be times when parents initially consent and, on the basis of later advice or reflection perceive that, in substance, the adversity of further litigation, and gains from that, dictate the withdrawal of consent. I do not consider that the father's represented consent was irrevocable.

[31] However, I accept there is merit in Mr LaHatte's submission that the Court is not in a position to impose its own view in relation to leave, as the drafting of the

[9] *Border v Tokoroa* [2015] NZFLR 832.

minute of 4 July (para [19]) appears to communicate. That is an error. However, it is an error without effect, because both parties have had a full opportunity, on notice, to make submissions in relation to the matter of leave.

[32] For the avoidance of doubt, where the substance of a matter, as applied by the mother in March 2023, seeks to reopen litigation which has recently been resolved, on a similar basis, because that party disagrees with the Court's resolution, the granting of leave, and the provision of consent by a party must be subject to a consideration of the welfare and best interests of the children.

[33] I endorse the submission of Ms Davidson that the granting of consent by the father, which appeared at the time he filed to be a necessary step to facilitate the litigation, was not a consent based on the best interests of the children. As soon as proceedings have simplified, the adversity to the children's best interests has become more stark.

[34] I reject the submission of Mr LaHatte, that the Court may not look behind a consent.

[35] The second matter which the Court is required to consider is that of materiality. Mr LaHatte submits that there is no more material consideration than a relocation. The father sought an amendment to the order providing for contact arrangements in two scenarios – the children in America and the mother in New Zealand, and the children in America and the mother in America. In the first scenario, the Court in New Zealand might have a role in resolving contact, although the order is not binding on a State Court in America. Nor is it registrable. In the latter alternative, the Court's role in determining contact will be for a period of no more than four months. The basis upon which leave is sought does not exhibit material change. It exhibits ongoing conflict, and extreme mistrust, and misattribution. In particular, I note the mother's attribution of motive to the father related to costs. The message related to costs is not related in time, at all, to the rugby season issue. Nor is the rugby season message an implementation of the intended action in the January 2023 message. The message is related to making it possible for these boys to play a rugby season.

[36] Ms Whelan strongly submitted that there is no material change where mother, father and children are moving to the same country. The mother has confirmed she will relocate also, and thus the order is rendered subject to change for convenience if the mother happens to reside too far from the boys to make the contact work. However, the order ceases to have affect once both parents and the children leave the country. Thus, the change, which is obvious, is not a material change in terms of the Court's jurisdiction under the Care of Children Act.

[37] Ms Davidson and Ms Whelan relied on a decision in *Roundtree v Tipsanich*.[10] In that decision, Judge Maude defined the Court's role in considering materiality as follows:

> … is the change of circumstances identified by [the mother], if her evidence is to be accepted, one in the context of the orders made by Judge Burns a material change.

[38] He continued that it is a material change if it would have altered the Judge's approach at the time the matter was determined. This case related to worrying health effects for a small child, in a context of high conflict.

[39] In the case, Judge Maude allowed leave, because he considered the intervening change in child behaviour and breakdown in parental cooperation were material changes, in part because the child was vulnerable.

[40] In this case, had I considered the matters raised by the mother in her application of 24 March 2023 related to what she regarded as capricious refusals by the father to adjust the state of the contact, I am confident that I would not have changed my point of view. Sadly, over the course of the litigation the Court has been able to perceive a substantial change in the approach of the father, derived in part from the therapeutic work the children were able to do, but in large part from the therapeutic work the father was able to do. I was at the time hearing, and remain confident that the father has a fine-grained appreciation of the children's needs. Sadly, reflecting on the part the mother has played in the litigation, and the complexity of her expectations on her children (in particular April 2020) and of her appreciation of her own contribution to

[10] *Roundtree v Tipsanich* [2016] NZFLR 99.

the complexities, I cannot say with the same confidence that the mother's approach reflects an appreciation of the boys needs external to her own. This is no change.

[41] I do not consider the matters raised in the mother's application of 24 March to be material. Leave is therefore declined.

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Judge JF Moss
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 31/07/2023