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**IN THE FAMILY COURT
AT WELLINGTON**

**I TE KŌTI WHĀNAU
KI TE WHANGANUI-A-TARA**

**FAM-2021-085-000339
[2023] NZFC 8318**

IN THE MATTER OF THE ADOPTION ACT 1955

AND

IN THE MATTER OF An application by

[HILDA JACOBS]

[JOSS JACOBS]

to adopt a child

Hearing: 2 August 2023

Appearances: J Wademan for the Applicant
S Hughes for [Jordan Leroy]

Judgment: 25 October 2023

RESERVED JUDGMENT OF JUDGE R VON KEISENBERG

[1] [Hilda Jacobs] is the mother of [Sara Leroy] born on [date deleted] 2005. [Sara] is now 18 years of age. [Sara]'s biological father is [Jordan Leroy]. Ms [Jacobs] and Mr [Leroy] have been divorced for several years. Ms [Jacobs] is now married to [Joss Jacobs] and together they have applied to adopt [Sara] in what is commonly referred to as a step-parent adoption.

[2] The applicants have applied to dispense with the father's consent to the adoption under s 8 Adoption Act 1955 on the grounds that he has failed to exercise the normal duty and care of parenthood in respect of [Sara].

[3] Mr [Leroy] opposes the adoption and has refused to give his consent. The main ground on which the father opposes dispensing with his consent is that following separation he claims Ms [Jacobs] actively undermined his relationship with [Sara] making it difficult for him to maintain regular contact with her.

[4] Accordingly, the issues for determination are:

- (a) whether Mr [Leroy] has failed to exercise the normal duty and care of parenthood in respect of [Sara];
- (b) if the first issue is answered in the affirmative, whether it is in the interests and welfare of [Sara] for the Court to exercise its discretion to dispense with the father's consent; and
- (c) in the event that consent is dispensed with then to determine the application for adoption.

The hearing

[5] The hearing proceeded on the basis of both parties, Mr [Leroy] and Ms [Jacobs] being cross-examined. Both counsel filed comprehensive legal submissions on the relevant law with reference to the leading cases.

Factual background

[6] I set out the relevant factual background in some detail because of the grounds relied on by the applicants to dispense with the father's consent. Many of the key facts are in dispute.

[7] [Sara]'s parents were married in South Africa in [month deleted] 2002. Shortly after their marriage, they decided to make the move to New Zealand. Mr [Leroy] travelled to New Zealand ahead of Ms [Jacobs].¹ She arrived a few months later. Not long after her arrival in New Zealand, she became pregnant with [Sara] and gave birth on [date deleted] 2005 in Wellington.

[8] The parties separated on [date deleted] 2006 when [Sara] was 13 months old. It is common ground that the parties were having difficulties in their marriage. On this date Ms [Jacobs] attempted to leave New Zealand back to South Africa without the father's knowledge but was stopped at Wellington Airport as a result of a CAPPS listing which had been put in place by him earlier.

[9] Following this event, the mother applied to the Family Court to relocate to South Africa with [Sara] which was opposed by the father.

[10] In 2007, the matter came before her Honour Judge Clarkson in a two-day defended hearing. Judge Clarkson declined the mother's application for an immediate relocation to South Africa for [Sara] but allowed her to relocate when the child was about four years of age in 2010.²

[11] A major plank of Ms [Jacobs]'s successful case for relocation was that the child would be able to maintain a relationship with her father once they had relocated to South Africa, either by the father choosing to relocate back to South Africa with them or by frequent contact by email and "Skype" communications. The mother contended that although the relationship between her and the former husband was strained, she

¹ [L] v [L] FC Wellington FAM-2006-085-628, 6 December 2007 at [3].

² At [56].

would ensure the principle contained in s 5(c) of the Care of Children Act as to consultation, co-operation between parents would be adhered to.

[12] In support of her application Ms [Jacobs] obtained a psychological opinion from a registered psychologist Ms McDougal. The Court also commissioned a report under s 133 from psychologist Gillian Taylor to assess the child's attachment to both her parents and the psychological impact of the proposed move.

[13] Judge Clarkson accepted Ms McDougal's opinion that the mother would continue to involve the father in the child's life. She observed:³

[37] A further important piece of evidence given by Ms McDougal on behalf of the mother was her opinion as to Mrs [L's] ability to involve Mr [L] in [S]'s life. She pointed to the quality of Mrs [L]'s relationship with her own father and stated that her father was seen as the most important person in her life. This, Ms McDougal considered, gave Mrs [L] considerable motivation to ensure her daughter received the same opportunity. Mrs [L] pointed to the evidence of the recent history where Mr [L]'s time with [S] had been increased significantly. She considered that to be an indicator for the future that if she were to be in South Africa she would do likewise: however, I believe her motivation to make the best possible opportunity for her to have contact with her father would be there in South Africa as well.

[14] In making her decision, Judge Clarkson found that the child's needs were:⁴

...the strengthening of her attachment to her parents but in particular to her mother, a high functioning primary parent; as fuller relationship with both parents as can be promoted within the circumstances permitted; physical safety and security; knowledge of her culture and extended family involvement and support."

[15] She also found that the mother was a "honest and sincere person who would honour the promises she made to the Court to support in every way an ongoing relationship between the child and her father should she be permitted to relocate".

[16] To give some context this, the relevance of these findings to the current application is what each party now claims happened subsequently. The mother claimed that prior to her leaving for South Africa, the father's contact was sporadic; no more than once a month and he regularly cancelled it. She says he made little effort to

³ At [37].

⁴ At [55].

maintain contact while she and [Sara] were in South Africa and that after her return to New Zealand his contact was again sporadic. The father strongly denied this, claiming the mother did not support his relationship with [Sara] and actively made it difficult for him to have contact and foster a meaningful relationship with her.

[17] I return to the chronology. The mother and [Sara] remained living in New Zealand until March 2010 as per the Court order to give the child an opportunity to develop a secure and stable attachment with her father prior to their relocation.

[18] In March 2010, Ms [Jacobs] and [Sara] left New Zealand to South Africa. The mother deposed that in the year she was in South Africa with [Sara], Mr [Leroy]'s family had little contact with the child and that he only called the child once. He denied this. Initially, Ms [Jacobs] enjoyed the support of her family in South Africa, however, her contentment was short lived. As a result of escalating political tensions in South Africa, she made the decision to return to New Zealand with [Sara] where she believed her physical safety would be better assured.

[19] In January 2011, Ms [Jacobs] advised Mr [Leroy] of her plans to return to New Zealand (It is not in dispute that prior to leaving New Zealand the mother had met [Joss Jacobs] but was not in a relationship with him at that time.) The father advised the mother that he had made plans to move to Australia, having assumed that their relocation was permanent.

[20] In March 2011, the mother returned to New Zealand, found a home for herself and [Sara], obtained a job and settled back into New Zealand life. After their return, she says the father only saw [Sara] sporadically and claimed there were now significant difficulties in their relationship.⁵ She also claimed that Mr [Leroy]'s verbal abuse of her had increased and was only exercising contact when it suited him. Within a short time of their return, she says [Sara]'s response to contact with her father began to deteriorate.

[21] Mr [Leroy] moved to Australia for what turned out to be a relatively short period. In his evidence, he said that he missed [Sara] and returned to New Zealand in

⁵ Affidavit of [Hilda], 17 September 2021, para 16.

April 2012. The mother alleges the father did not contact [Sara] during his time in Australia which the father again denied. The mother claims that from the age of eight [Sara] was expressing a reluctance to see her father again.⁶

[22] In January 2013, Mr [Leroy] instructed a lawyer to write to Ms [Jacobs] because of his concerns about the irregular and limited contact he was having to [Sara].⁷ He proposed fortnightly overnight contact each Saturday from midday to Sunday midday, face-to-face contact on her birthday and other contact by agreement. He also asked that she consult him on guardianship issues which he says was not happening, including where [Sara] was living, what school she attended, medical treatment, and any changes to her name.

[23] In February 2013, Ms [Jacobs]'s lawyer responded that her client had expressed concerns about the father/daughter relationship and that it needed more work.⁸ Counsel advised that Ms [Jacobs] had taken [Sara] to a registered psychologist, Kevin Garner, for two sessions to try and unpack what was happening for her. A copy of his email advice was attached to her affidavit. Mr Garner recommended to Ms [Jacobs] that "*contact with her father should be presented to [Sara] an adult decision rather than any choice for [Sara].*"⁹ Ms [Jacobs], in response, proposed daytime contact for Mr [Leroy] with [Sara] and that he attend counselling/therapy with her and the psychologist Mr Garner.

[24] Contact continued for a while after but broke down again in October 2013. The father proposed that contact with [Sara] be at his home, but the mother declined, citing that [Sara] "would not be comfortable."

[25] In February 2014, the parties agreed to engage with Kevin Garner. The mother says that she had consulted Kevin Garner because the father had failed to accept that he had played a significant part in the difficult relationship he had with [Sara].

⁶ Para 25.

⁷ BOD page 112.

⁸ BOD page 114.

⁹ BOD page 115.

[26] On 16 April 2014, after several sessions with the parties and [Sara] separately, Kevin Garner wrote to them recommending there should be no further appointments and that contact between [Sara] and the father should resume. He wrote “We have made sufficient progress to enable contact to resume”. He recommended that the parties come back to him immediately if:¹⁰

[Sara] says anything about not seeing [Jordan] and you are unsure how to proceed. I think you do need to be mindful that [Sara]’s says some quite confusing things at times – during these sessions she said she is excited about seeing [Jordan] again and at other times she is anxious. She said that she doesn’t want contact to start until her birthday and then she has also said she wants it to go back to a pattern like it used to be one week with Mum one week with Dad. Right now I couldn’t tell you what [Sara] really wants. Go with what you each think is best and try to reach agreement.

[27] He also wrote:

[Sara] is a people pleaser and a parent watcher. She tries to determine what your reactions will be or what they are based on your appearance and she decides what to say or how to say it to please or avoid conflict. (Emphasis added) So [Jordan] keep repeating to [Sara] that she can tell you anything she doesn’t like. You will listen and accept what she says. You won’t always do what she want but you will accept what she says.

[28] Ms [Jacobs] responded to Mr Garner on 29 April 2014 highly critical of his advice.¹¹ She told him that it was not his role to make any determination or recommendation regarding contact and that the resumption of contact resuming was a natural outcome of how the sessions went. She advised him that it was “not his place to suggest to whether [Sara] is ready for contact to resume or not.” She railed that [Sara] had to go through the “uncomfortable process while not much was achieved”. Copying in Mr [Leroy] with her response to Mr Garner, she told the father that all future contact would only be in public place (although no reasons were given).

[29] Mr Garner responded to Ms [Jacobs] on 5 May 2014 clearly taken aback by the finality of Ms [Jacobs]’s response.¹² He repeated that sufficient progress had been made for contact to resume and that, in fact, he was “stating the obvious”. He wrote:

I am surprised that you feel as negatively about the sessions as your email suggests [Hilda]. I recall you expressing very positive views about my

¹⁰ BOD page 125.

¹¹ BOD page 124.

¹² BOD pages 103 and 124.

involvement until this last session. I'm not sure what happened to change those views other than my suggestion that we do not have more sessions or my comment that sufficient progress had been made for contact to resume.

[30] Mr [Leroy], through his counsel, claimed this exchange between Mr Garner and Ms [Jacobs] was clear evidence that she had no intention of progressing or supporting his contact but relied entirely on what she says were the child's views rather than ensuring that the parents made the decision.

[31] The final contact between the father and [Sara] occurred in July 2016. Up until that time the contact was at such times as the mother agreed. In his oral evidence, the father acknowledged that the only option for him was to issue proceedings but was reluctant to put [Sara] through it.

[32] In January 2018, the mother applied for a guardianship direction to allow [Sara] to travel to South Africa. Mr [Leroy] opposed it initially. He took the opportunity to try and secure regular contact to his daughter given what he viewed had been the insurmountable difficulties he had faced to date. The guardianship issue was eventually resolved by consent. However, counsel for the father proposed that the parties attend s 46G counselling and obtain assistance from a psychologist to determine why [Sara] held the views she did and to recommend a contact regime which would promote [Sara]'s welfare and best interests.

[33] The mother declined any further counselling and did not consent to [Sara] being referred to a psychologist. As far as she was concerned, the guardianship issues were now resolved.

[34] Despite the mother's objection, the Court directed s 46G counselling and the parties were referred to a psychologist, Richard Sawyer. After several sessions, he recommended that [Sara] speak with an independent psychologist.¹³ The parties agreed. Mr Sawyer referred [Sara] to a clinical psychologist, Dr Rachel Irwin, who was provided with a brief history of the matter; the parties had been separated since their daughter, [Sara], was one and a half, that she was now 12, and that although the father had had regular visits, since 2016 the child had now declined or refused to see

¹³ BOD page 150.

him. The father wanted regular visits to be resumed and was unaware of any issues preventing this but was keen to do any remedial work to facilitate seeing his daughter again.

[35] Dr Irwin's brief was to assess whether there were any psychological issues preventing [Sara] seeing her father; what events or circumstances have contributed to this and prioritising the child's well-being alongside the father wanting to have a relationship with his daughter and the child's anxiety.

[36] On 9 August 2018, Dr Irwin reported in a one page email to the parents and Mr Sawyer that, having met with [Sara] on two occasions, she had found no evidence that the child had any underlying psychological issues which warranted any psychological input.¹⁴ She concluded there was no evidence that [Sara]'s frustrations had come about from alienating or enmeshment influences from the mother. Rather, the child's views were based on specific situations as she had experienced them with her father and that ongoing questioning and counselling "*may have the adverse effect of creating more stress and discord whereas she actually needs some stability and closure in terms of her relationship with [Jordan]*".

[37] Dr Irwin's opinion in the context of these proceedings was highly contentious. The mother relies on Dr Irwin's conclusions in support of her application to dispense with the father's consent. The father's counsel submitted that little weight should be placed on Dr Irwin's opinion, having only met with [Sara] on two occasions and in the absence of meeting or speaking with either parent to give some context to the child's views. She had formed her conclusions entirely on what the child had told her without an opportunity for the father to challenge it.¹⁵

[38] In May 2019, the mother sent the father a photograph of [Sara]. He responded and asked whether he could see [Sara] in person to give her art books which he had bought her.¹⁶ The mother declined, stating that she would not force [Sara] against her will to engage with him in any way. The following correspondence was exchanged.

¹⁴ BOD page 154.

¹⁵ BOD page 154.

¹⁶ BOD pages 87-89.

[39] On 9 May 2019, the mother wrote:

Hi [Jordan]

I understand that you would miss [Sara]. I spoke to her about your email and that you asked to see her and give her a gift. Nothing has changed for her since she decided not to see you anymore. I will support her in her wishes as I always have and will not force her against her will to engage you in any way. That is not what she wants.

Regards

[Hilda]

[40] The father replied:

Hi [Hilda/Joss]

I find it disturbing that you do not encourage a healthy relationship with my daughter. I have not done anything to deserve this kind of treatment. You have not provided any explanation as to why [Sara] does not want to see me. As far as I'm concerned it is very unhealthy to support this kind of relationship with her paternal father. I've not seen [Sara] in nearly three years which go beyond the ordinary. What kind of values does that instil?

Please give a genuine explanation why you have taken this stance. How would you feel if this kind of treatment had been posed on you without genuine reason or clarification. I miss [Sara] and love and will like to see her without constraint. Please respond.

[Jordan]

[41] Mr [Leroy] nevertheless sent the books to [Sara] but these were returned to him unopened.

[42] In August 2019, the mother advised Mr [Leroy] that [Sara] had now moved from [College 1] to [College 2].¹⁷ He responded that he had not been consulted and asked for a photograph. Subsequently he made an appointment to meet with the principal to find out how she was getting on.¹⁸ Although [Sara] did not see him when he went to the school, she was informed (by whom it is unclear) that he had turned up at the school.

¹⁷ BOD page 94.

¹⁸ NOE page 82.

[43] Following this event, on 10 September 2019 the principal, Mr [Gregory], sent a letter to Ms [Jacobs] advising that they had sought legal advice regarding the father's ability to gain access to [Sara]'s school records.¹⁹ He noted that the child had been distressed when she found out he had been in contact with the school. He also understood (on what basis it is also unclear) that she did not want contact with her father. On the basis of [Sara]'s health and wellbeing, the principal advised Ms [Jacobs] that they had decided not to release any information to the father unless directed by a court, so they did not become the "meat in the sandwich". I address this later in this decision.

[44] The father's evidence, as he depicted it, painted a different picture:

- (a) He says his contact with [Sara], after 2007 until their relocation in 2010, was regular and included weekends until Ms [Jacobs] and [Sara] left New Zealand. This was not challenged to any degree.
- (b) Prior to the mother leaving New Zealand for South Africa in 2010, she changed the date of departure and left earlier without telling Mr [Leroy]. He says he was not given an opportunity to say goodbye to [Sara]. She left a letter in his letterbox advising that they had departed. (The mother in response says she did this because of mounting "safety issues" for her and [Sara], claiming that he was becoming unsettled knowing they were due to leave.) I address this later in this decision.
- (c) He disputed the mother's claim that he had no contact with [Sara] while they were living in South Africa and said he had regular contact with her by video.²⁰ As to his family's contact, he said that he had a very small family which including his grandmother, who had dementia, and his mother, who lived in [city in South Africa], and who had only been able to see [Sara] the once.

¹⁹ BOD page 28.

²⁰ BOD page 77.

- (d) He rejected the mother's criticism that he had taken a job in Australia after they returned to New Zealand. He had lost his contract in New Zealand and while they were still living in South Africa had accepted a contract in Australia. He remained in Australia from [month deleted] 2011 to [month deleted]2012.
- (e) He has paid regular child support throughout [Sara]'s childhood (which was supported by the evidence).

Legal principles

[45] There is common ground among counsel as to the relevant legal principles and case law applicable.

[46] Section 8 of the Adoption Act sets out the circumstances in which the Court may dispense with the consent of any parent or guardian to the adoption of a child. The applicants rely on one ground only and that is that the father has failed to exercise the normal duty and care of parenthood. The relevant portion of s 8 reads:

8 Cases where consent may be dispensed with

- (1) The court may dispense with the consent of any parent or guardian to the adoption of a child in any of the following circumstances:
 - (a) if the court is satisfied that the parent or guardian has abandoned, neglected, persistently failed to maintain, or persistently ill-treated the child, or failed to exercise the normal duty and care of parenthood in respect of the child; and that reasonable notice of the application for an adoption order has been given to the parent or guardian where the parent or guardian can be found: ...

[47] The onus of proving the failure rests on the applicants. If a finding is made under s 8 it is only then that the Court's attention is directed to s 11 of the Act.

[48] Counsel acknowledge that a finding that a parent has failed to exercise the normal duties of parenthood does not necessarily involve the finding of culpability on the part of the defaulting parent.²¹

²¹ *P v C* [2001] NZFLR 193.

[49] The leading decision regarding s 8(1) still remains the Court of Appeal decision of *Director-General of Social Welfare v L*.²² Richardson J held that isolated failings would not suffice to establish the ground and that a broad assessment over the whole of the child's life down to the hearing is required.²³ Any failure is to be assessed as an objective standard in light of all the circumstances.

[50] Counsel for the father submitted that in view of the gravity of the decision the court is required to give careful consideration of the factors and that it must be satisfied to a high standard that the father, Mr [Leroy], failed to exercise the normal duty and care of parenthood in respect of [Sara]. Speight J commented on this in *L v B*.²⁴

With respect I suggest as I have already said, that there is no statutory requirement that there must be a high degree of failure. There must be failure or neglect or one of the other statutory criteria before the jurisdiction can be exercised. Once that has been found to exist, as has been found here, then of course the degree of such failure is highly relevant to the exercise of the discretion.

[51] As the Courts have frequently commented, the procedure of dispensing with a parent's consent has often been referred to as a "statutory guillotine."²⁵ The ground of failure to exercise normal duty and care of parenthood has been broadly interpreted by the Courts and is effectively a catch all for those cases which do not reach the threshold of the other factors.

[52] A description of parental duties was addressed in *E v M* by Jeffries J.²⁶

The normal duty and care owed by a parent to a child is to nurture the child to a stage where it is independent of the parent. The nurturing process has some clearly identified viable characteristics which are shared by most humans. The provision of shelter, clothing, food together with love and affection. In preparation for independence education in its broadest sense all this demands close and attentive physical and emotional involvement.

[53] Judge von Dadelzen in *Re Adoptions 3 and 4* observed (which has relevance to the current matter) that "necessarily, of course, the degree to which that duty and care

²² *Director-General of Social Welfare v L* [1989] 2 NZLR 314; [1989] 5 FRNZ 164; [1990] NZFLR 125.

²³ At 319; 168; 129.

²⁴ *L v B* (1982) 1 NZFLR 232 at 237.

²⁵ *Re B (a minor) (adoption by parent)* [1975] 2 WLR 569 at 583.

²⁶ *E v M* NZSC Wellington M361/79, 13 September 1979.

is discharged will very often be less than in the case of a non-custodial parent and due allowance must be made for that.”²⁷

[54] Each case must be considered in the context of the facts and circumstances surrounding that child. The meaning of “failure to exercise the normal duty and care of parenthood” is not to be given an overly legalistic meaning. The qualities of parenting expected from a normal parent within the general population are a matter of common sense and human experience.

[55] Judge CP Somerville in *P v C* summarised the prevailing case law as there being a need for a “close nurturing relationship” and “that relationship needs to be examined over the whole life of the child.”²⁸

[56] Ms Wade, counsel for the applicants argued that the case law clearly establishes that a fundamental parental duty aside from providing care for a child is at the very least to have regular contact with the child and to share the making of important decisions affecting that child. While that is accepted in principle, the reasons for lack of regular contact or involvement in guardianship decisions must also be relevant.

[57] Judge Bispham stated in *In the Adoption of W*:²⁹

Where access has been reserved a non-custodial father has a duty to exercise that access and a concomitant duty to so behave and conduct himself so that he does not place access in jeopardy. He must also in my view take a close interest in the children’s health, education, physical and emotional welfare and in general terms continue to exercise some control over the upbringing of the children, subject of course to custody and access orders.

[58] One of the challenges facing the father in these proceedings is that he has not had face-to-face contact with [Sara] since 2016 and has struggled to exercise his guardianship rights in respect of the child. A further complicating factor is the child’s reluctance to have contact with her father since the age of 12 a matter I address later in this decision.

²⁷ (1990) 7 FRNZ 45 at 50.

²⁸ *P v C*, above n 29, at 198.

²⁹ *In the Adoption of W* [1981] 1 NZFLR 33.

[59] In *Re J (adoption)* the birth father desperately wanted to be involved in the care of his daughter and had paid child support regularly.³⁰ However, the child had made untested allegations of sexual abuse and did not want to have contact. He had not pressed for contact because of the daughter's unwillingness and had not had any contact for three years. There was evidence of animosity between the father and the foster parents who were seeking to adopt the child. The Court considered an adoption would give the child a greater sense of security and would avoid further litigation. The Court concluded that the father's relationship had broken down and that he had failed to exercise the normal duty and care of parenthood.

[60] However in *Re Sinclair*, a decision of Judge Murfitt, the Court declined to dispense with the father's consent in the face of opposition from the social worker.³¹ In this case, the child initially had frequent access with the father. However, from 2014 until the date of hearing, the child no longer had any contact with the father. The stepfather had essentially become the psychological parent.

[61] Judge Murfitt noted:³²

[15] ...Despite its current unfashionability with the medico/legal circles adoption has the capacity to provide a child with an intact family, a sense of belonging and sense of normality without the multi-threaded complications of diverse relationship which demand the child's attention. There are of course many shortcomings associated with adoptions. It pretends to deny the existence of biological heritage. It interferes with sibling or half-sibling relationships. It can create an untrue picture of the child's cultural or ethnic origins. For some children, adoption provides a safe secure family environment which a child may flourish and grow. For others, it leaves a sense of incompleteness, concerns of abandonment and mystery about cultural or medical histories.

[62] Judge Murfitt also noted Judge CP Somerville's comments in *P v C* at [195] that if no ground can be made out for dispensing with consent and that consent is refused, the application to adopt cannot proceed no matter how meritorious.

[63] In *In the Adoption of W* an order dispensation was refused where the mother had actively discouraged access and where there had been no meaningful contact for

³⁰ *Re J (adoption)* [1999] 19 FRNZ 77.

³¹ *Re Sinclair* [2016] NZFC 7430.

³² At [15].

five years, but the father had paid regular child support.³³ Despite the Court finding there had been a failure on the part of the father to exercise the normal duty and care of parenthood, they declined an order dispensing with his consent.

[64] The law provides that if the Court considers the ground under s 8 is made out there remains a discretion as to whether the Court will dispense with that consent. Counsel for Mr [Leroy] argued that there was nothing in s 8 that requires the Court on an application to dispense with consent of a birth parent, to treat the welfare and interests of the child as a consideration much less the paramount consideration as required in other child related family law statutes or United Nations Convention on the Rights of the Child. Only once the ground is made out can the Court consider the welfare of the child.

Has the Mr [Leroy] failed to exercise the normal duty and care of parenthood towards [Sara]?

[65] As noted, there is a significant dispute between the parties regarding the key facts in this matter. Counsel for Ms [Jacobs] urges that the father's consent should be dispensed with based on his failures which she summarised in her submissions.

[66] Having considered all matters, I am not satisfied that the applicants have established their case that the father has failed to exercise the normal duty and care of parenthood. In reaching this decision, I took a broad assessment of the child's life as directed by the High Court in *DGSW v L*,³⁴ and that any failure was to be assessed as an objective standard in light of all the circumstances.

[67] In reaching this conclusion I examined each of the "failures" of the father as claimed by counsel for the applicants:

- (a) Mr [Leroy] failed to provide affection or interest towards [Sara] resulting in a failure to establish a secure psychological attitude.

³³ *In the Adoption of W*, above n 39.

³⁴ *Director-General of Social Welfare v L*, above n 30.

- (b) Failed to exercise a basic level of contact with [Sara]’s notwithstanding a variety of court orders.
- (c) The contact between the father and daughter was infrequent and sporadic.
- (d) The absence of a psychological bond. It was submitted that the father’s refusal to “meet” with the child so she could tell him directly why she did not want to see him was evidence of his refusal to see things from her perspective.
- (e) While acknowledging that Mr [Leroy] has provided some child support, no additional or financial support was given.
- (f) Mr [Leroy]’s contributions to the emotional and psychological development of [Sara] has been flawed leading to “panic” attacks, a sense of worthlessness and an eating disorder.
- (g) The child has no relationship with any member of her paternal family.

[68] Counsel for Mr [Leroy] argued that in view of the history of her care, the grounds had not been made out and in reaching that view the Court should factor in the alienating behaviour exhibited by Ms [Jacobs] which had prevented the father in being present in the child’s life.

The father’s failure to provide affection, care or interest in [Sara]

[69] I am satisfied that the evidence clearly establishes that from the end of the parties’ marriage, the father experienced considerable difficulties in trying to maintain a consistent and meaningful relationship with his daughter. I accept the submission that this commenced when the mother first attempted to leave New Zealand in 2006 without advising or consulting with the father. The mother was only prevented from doing so because of the CAPPS listing in place. Despite the confidence expressed by HH Judge Clarkson in her decision that the mother would support the father’s

relationship with [Sara] once she relocated to South Africa, I am satisfied that the mother's attitude towards the father being part of [Sara]'s life was indifferent at best.

[70] Ms [Jacobs]'s decision to move her date of departure to South Africa earlier without advising the father is an example of conduct which, in my view, clearly undermined the parent/child relationship. I find that her explanation for doing so, on advice from a social worker and the police when she had told them that the father was "unsettled" and there was a risk of him uplifting the child, lacked credibility. There was no evidence to support this or that the father had tried to prevent their departure. There was a court order in place which permitted her to relocate to South Africa with [Sara].

[71] Much was also made of the fact that the father's family in South Africa did not engage with [Sara] during the one year she was there. However, it was plain from the evidence that the mother made no attempt to engage with the paternal family while she was there, nor is it disputed that the father had little family to speak of in South Africa.

[72] The mother's allegation that the resumption of contact to the father in 2012 had caused "generalised anxiety, separation anxiety and an eating disorder" to [Sara]³⁵ was not supported by any evidence which in view of the seriousness of these conditions was surprising. The visits to psychologist, Mr Garner, and to Dr Irwin were focused on the resumption of contact with the father. The mother's oral evidence confirmed that [Sara] had not received any therapeutic interventions to address her alleged issues.³⁶

[73] I consider that the involvement of psychologist Kevin Garner with the parties is material to this dispute. As noted earlier, Mr Garner had recommended that [Sara]'s contact to her father should resume. Ms [Jacobs]'s dismissive response to Mr Garner's recommendation, in my view, gives credence to the father's position that the mother did not support him having an ongoing relationship with [Sara]. In her oral evidence, Ms [Jacobs] stood firm in her belief that she was simply giving "a voice to her child's

³⁵ BOD page 11.

³⁶ NOE page 26, lines 10-12.

wishes.” The strength of her conviction was borne out by the unequivocal response to Mr Garner, that it was “not his job to recommend resumption of contact,” a view by any definition given his role, made little sense of the parties’ initial engagement.

[74] The mother was steadfast in her evidence that it was up to the child to choose whether she saw her father and that she would support her child’s decision, noting that Kevin Garner’s original recommendation was that ongoing contact was to be an adult decision and not left to the child.

[75] When questioned, Ms [Jacobs] told the Court that despite Mr Garner “recommending resumption of contact” she “knew” that was not what [Sara] actually wanted because she had discussed matters with her prior to the sessions commencing and after the sessions commencing.³⁷

[76] When it was put to Ms [Jacobs] that in 2007 the Court appointed psychologist considered the father’s relationship with [Sara] was close and comfortable, she responded:³⁸

That’s correct when she was a baby and that’s when she couldn’t voice her opinion on what she wanted and that she’s her own person in herself with her own wishes and her own wants and her own emotions.

[77] The mother also considered it pivotal to her case that the father had refused to meet with [Sara], then aged 11, so she could tell him face-to-face what she thought about their relationship. The mother was questioned about the impact this would have had on the child.³⁹ Her response was that this would be “very empowering” because the child had struggled tremendously with guilt about the relationship she had with her father. In my view, Ms [Jacobs] demonstrated little insight into the emotional needs of a child so young to have been placed in a position where she was expected to be responsible for the outcome of her relationship with the other parent.

[78] As noted earlier, Dr Rachel Irwin’s 2018 opinion was the source of considerable conflict. Counsel for the father argued that little weight should be given

³⁷ NOE page 47.

³⁸ NOE page 52.

³⁹ NOE page 22.

to Dr Irwin's opinion that there no evidence of any enmeshment or alienating behaviour by the mother and the cause of the issues in the relationship was due to the father.

[79] The concept, now referred to in the Family Court jurisdiction as "refuse/resist" rather than parental alienation is widely accepted as being a complex issue. By any view, it deserved a more nuanced and detailed approach from Dr Irwin than the brief email she sent to the parents after two meetings with the child without any other information being provided or giving them an opportunity to talk with her to give some context to the child's views.

[80] It is not in dispute based on the mother's own evidence that the child has conflicted in her feelings about her relationship with her father. That in itself clearly suggests the situation was not as black and white as the mother claimed. The mother has consistently maintained that [Sara] did not want a relationship with her father and was fearful of him yet when questioned struggled to identify what those issues were apart from some minor issues.

[81] Counsel for the Ms [Jacobs], in her submissions, was strongly critical of the father in not trying harder to maintain his contact with his daughter and yet there is clear evidence that when he tried to re-establish his relationship with his daughter, it was met with significant resistance. I am satisfied that Ms [Jacobs] did not support Mr [Leroy]'s relationship with his daughter and intentionally or otherwise influenced her views about him.

[82] I now briefly comment on the 2019 incident when the father visited [Sara]'s new school at [College 2] to meet with the principal as he was entitled to do. The response from the school in my view was entirely disproportionate. The letter from the school to Ms [Jacobs] (there was no evidence that a copy had been sent to the father) advising that after taking legal advice they would not be providing information to the father about [Sara] unless directed to by the Court, strongly suggests this was in response to pressure placed on them. I do not accept the suggestion that they made this decision off their own back.

[83] I acknowledge that a social worker from Oranga Tamariki has filed a report supporting the granting of a dispensation of the father's consent for the reasons provided. However, I do not need to consider this or the views of the child unless or until the criteria for the dispensation of consent has been met. Westlaw summarises this:⁴⁰

In considering whether to make an adoption order, s 11 of the Adoption Act 1955 requires the court to be satisfied that the welfare and interests of the child will be promoted by adoption. There is nothing in s 8 that requires the court, on an application to dispense with consent, to treat the welfare and interests of the child as a consideration let alone the paramount consideration as is required by article 21 UNCROC. But s 8 is framed in such a way that, once one of the prescribed criteria has been found proved, the court has a residual discretion to make or refuse an order dispensing with consent.

[84] In summary I have concluded that the father has not failed to exercise the normal duty and care towards parenthood for the reasons I have outlined and on that basis the criteria for dispensing with consent has not been met. Accordingly, the application to dispense with the father's consent is dismissed.

Signed at Auckland this.....day of2023 atam/pm

R von Keisenberg
Family Court Judge

⁴⁰ *Child Law* (online looseleaf ed, Thomson Reuters) at AP8.02.