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

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IN THE FAMILY COURT
AT NORTH SHORE

I TE KŌTI WHĀNAU
KI ŌKAHUKURA

FAM-2015-090-000746
[2022] NZFC 2819

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[CARTER] Applicant
AND	[SCOTT] Respondent

Hearing:	29 March 2022
Appearances:	Applicant in Person T Brown and Ms Krebs for the Respondent C Podwin and R Adams as Lawyer for Child
Judgment:	2 April 2022

RESERVED JUDGMENT OF JUDGE K MUIR

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[1] [Aaron Scott] is six years old. On 14 February 2020, Judge Coyle decided that [Aaron] should be in Mr [Scott]'s day to day care at his home in Auckland. Until then [Aaron] had been living with Ms [Carter] in [location D]. That decision was upheld by Lang J in the High Court on 26 June 2020 after Ms [Carter] appealed.

[2] [Aaron]'s parents have been involved in litigation about his care since he was three months old. Pursuant to s 139A of the Care of Children Act 2004 (the Act) a new proceeding may not be commenced without leave of the Court less than two years after the final order was made. On 20 September 2021 Ms [Carter] filed a without notice application for new parenting orders. Her application was declined but she was given interim leave to pursue it.

[3] Mr [Scott] initially opposed her application for leave. However, that opposition was withdrawn after the second anniversary of Judge Coyle's decision passed. It would have been futile for Mr [Scott] to continue to resist the application for leave after that date as Ms [Carter] could simply have commenced a new proceeding as of right in any event.

[4] With his notice of opposition Mr [Scott] filed an application to have parts of the affidavit that Ms [Carter] had filed dated 7 September 2021, struck out or not read pursuant to r 170 of the Family Court Rules. He subsequently applied for an order that Ms [Carter] be required to pay a bond pursuant to s 70 of the Care of Children Act 2004. In the submissions filed in support it was said the bond was "… *to prevent her from unnecessarily filing more unwarranted application in the Court regarding [Aaron]*". Mr [Scott] was concerned among other things that Ms [Carter] had not paid $11,542.42 in costs that were awarded in costs against her by the High Court.

[5] Mr [Scott] also seeks costs from Ms [Carter] in relation to her application for leave to bring her parenting application and in relation to the current applications that are before the Court.

The Issues

1. Should the parts of Ms [Carter]'s evidence that are identified in the schedule attached to Mr [Scott] affidavit be struck out as inadmissible?

2. Should Ms [Carter] be required to pay a bond of $20,000 under s 70 of the Act?

3. Should I award costs in Mr [Scott] favour?

The Affidavit Evidence

[6] Mr [Scott] says parts of the affidavit are hearsay and inadmissible and parts are inadmissible opinion evidence.[1]

[7] He also objects to a "*transcript*" which is annexed to the affidavit and referred to in Ms [Carter]'s affidavit. The "*transcript*" is partial record of parts of a meeting between Mr [Scott], his partner [Cindy], Ms [Carter], her husband and a specialist paediatrician Dr Warwick Smith. This meeting was surreptitiously recorded by Ms [Carter]'s husband with her knowledge and approval and her "*transcript*" which appears as Exhibit E to her affidavit, is a mixture of extracts from the recordings and her observations or views as to what was happening at the time of the recording. Nobody at the meeting knew of the recording and no one consented to it being recorded other than Ms [Carter] and her husband. No one else has consented to the transcript of the meeting nor the recording as a whole being used as evidence in this case. The meeting includes discussions of legal matters that would otherwise be private to [Aaron] and his parents.

Opinion Evidence

[8] In the fourth subparagraph of paragraph 3 of her affidavit, Ms [Carter] said:

> "The child with ADHD and anxiety issues, if not dealt with correctly early on, can develop into serious mental health issues. Dr [Segal], a paediatrician of Tauranga Hospital had reviewed [Aaron] when he was in my care on 7 May

[1] Sections 23, 24 and 25 of the Evidence Act 2006.

> 2018 (attached marked (c)). He concluded there was some behavioural issues with [Aaron], and this was forwarded onto a child psychologist and speech and language therapist."

[9] The first sentence of that subparagraph is evidently Ms [Carter]'s opinion and is clearly inadmissible. She does not have or purport to have any expertise on ADHD or anxiety issues. Even if she did, her opinion evidence would not be admissible as she has not qualified herself as an expert, has not said she would comply with the code of conduct for expert witnesses and cannot comply with that code because among other reasons, she is clearly not independent.

[10] It also includes hearsay evidence being the summary of an opinion given by Dr [Segal]. That hearsay evidence refers to Exhibit C which dates from May 2019. That is a document that was available at the time of the hearing before Judge Coyle.

[11] It is not relevant and cannot be relevant to Ms [Carter]'s current application. In any event, if Ms [Carter] wished to provide any expert opinion evidence from Dr [Segal], that evidence ought to have been given directly by him. Neither Exhibit C nor her statement about Dr [Segal]'s opinion fall within the exception contained in s 18 of the Evidence Act. There is no evidence that Dr [Segal] as the maker of the statement is unavailable as a witness and given that the opinion dates from 2019, I do not accept that any undue expense or delay would be caused if an affidavit had been sought from him.

[12] I accept that under s 12A(4) of the Family Court Act 1980 I have an additional discretion to receive "*any evidence, whether admissible or not under the Evidence Act 2016 and that the Court considers my assistance to determine the proceeding*".[2] Before I would consider exercising my discretion under s 12A(4) I would need to be satisfied that the evidence in question was relevant and reliable.[3] The requirement that I consider the evidence "*may assist me in determining the proceeding*" has been

[2] Section 12A(4) Family Court Act 1980.

[3] In *Faw v Faw* [2015] NZFC 2215 at [15] it was emphasised that "… *relevance is also the key issue when determining the admissibility of evidence, both under the Evidence Act 2016 and under s 12A Family Courts Act 1980*".

described as a "*gateway*" which must be satisfied before the Court can decide whether to admit otherwise inadmissible evidence.[4]

[13] Exhibit C, which is the letter from Dr [Segal], was prepared based extensively on a history provided by Ms [Carter] alone. The letter provides no conclusions as to [Aaron]'s conditions and I do not consider that it assists the Court in determining the proceeding. It is not to be read as part of the evidence if this matter proceeds.

[14] The third paragraph in paragraph 3 is inadmissible opinion evidence by Ms [Carter]. The first sentence in the next paragraph is inadmissible hearsay. Those passages are not to be read out and should be redacted.

[15] Ms [Carter] is clearly focused on her belief that [Aaron] is either autistic or suffers from ADHD. Her concern about [Aaron] being autistic was addressed by Judge Coyle in his decision of 14 February 2020. He found in essence that her concerns were without valid or substantial foundation. Exhibit 8, her affidavit, is a letter from paediatrician Warwick Smith. Dr Smith concludes that "*[Aaron] does not clearly have mild ASD*".[5] The doctor concludes that he has anxiety including some social anxiety to volatility which has improved. He had previously displayed significant aggression in his mother's care, sometimes at school, but reportedly not with his father. The doctor concludes that there are symptoms of ADHD[6] and [Aaron] has global learning difficulties. The paediatrician concluded that learning support would be important, initially through the school's Resource Teachers Learning and Behaviour, but he made no plans for follow up. There is nothing in that letter to indicate that any urgent interventions are required by the Family Court in [Aaron]'s behalf. Indeed, there is nothing in Ms [Carter]'s affidavit to indicate that it was appropriate for her to make an application for a new parenting order on a without notice basis.

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[4] *Magan v Magan* [2014] NZFC 8181 at para 4, per Judge Coyle.
[5] ASD is Autism Spectrum Disorder.
[6] Attention Deficit and Hyperactivity Disorder.

[16] Without notice applications should be reserved for genuinely urgent matters where the delay caused by proceeding on notice might cause harm to the child for example. This application was not urgent.

The Transcript

[17] Ms [Carter] has not transcribed the entire meeting which lasted some one hour and 10 minutes. She claims to have only transcribed the relevant parts, although she offered in submissions to provide a complete transcript and to make a file containing the entire recording available. The exhibit is referred to in paragraph 4 of her affidavit which commences "*the second reason I am filing this on a without notice application is [Mr Scott]'s coparenting and vendetta against me as [Aaron]'s mother*". She claims the recording shows Mr [Scott] and his partner behaving badly, "*in the recording [Mr Scott]'s behaviour is extremely close-minded, irrational and demeaning*".

[18] There are significant parts of this paragraph which are inadmissible opinion and statements of Ms [Carter]'s beliefs. They are not to be read out and the paragraph should be redacted. Exhibit F is a message from "*a few years ago*". It cannot be relevant to the current application and would have been available prior to Judge Coyle's decision. It should not be read out, should be removed as an exhibit.

[19] In Exhibit E, the "*transcript*" itself, are numerous "*editorial comments*" such as "(*[Cindy] Jumps in over the paediatrician*)", "(*[Mr Scott] interrupts and tries to talk over the top of the paediatrician*)", "(*[Mr Scott] buts in over the paediatrician*)" (sic).

[20] As well as objecting to the admissibility of the transcript or recording as a whole, Mr [Scott] objects to many of the specific editorial comments. They are not evidence. They are Ms [Carter]'s impressions or beliefs. If the transcript or recording was admissible it would be for the Judge hearing the matter to decide whether there was an "aggressive tone" used (for example).

[21] The difficulty with reliance being placed on a recording taken without consent and knowledge of all participating is that there will often be a concern that the events

recorded are "*staged*" by the parent who is recording the events. As Judge Riddell noted in *S E T v C J T*:[7]

> "… There is the potential for the engineering or manipulation of situations by the respondent or any of his prospective witnesses who were aware the conversations were being recorded. To that degree there is the possibility that the transcripts may unfairly bolster the credibility or evidence of the respondent and his witnesses."[8]

[22] The transcript that Ms [Carter] has produced is clearly selective and includes the editorial comments, some of which amount to inadmissible opinion evidence from her. The transcript is not admissible as it is not a reliable record of the discussion as a whole. I direct that it should not be read and that it should be removed from the affidavit.

[23] It would also be inappropriate for a complete transcript or the recording itself to be produced as evidence. There are issues of consent and fairness. It is contrary to the interests of justice to allow a party who has surreptitiously and deceptively taped a meeting without consent to seek to rely on the recording unless the evidence is highly relevant and compelling. The selected parts "*transcribed*" by Ms [Carter]'s husband are neither. The recording is unlikely to assist the Court on any relevant issue.

[24] [Aaron]'s lawyer Mr Podwin is also concerned that [Aaron]'s rights of privacy are being breached through surreptitious recordings being made of discussions concerning him. He was concerned that [Aaron]'s best interests and welfare were compromised by the recording of the meeting and by the way Ms [Carter] seeks to use the transcript. There is substance to his concerns.

The Bond Application

[25] Section 70(1) of the Act allows a Court to "*order a party who has contravened a parenting order to enter into a bond as an assurance that the party will not contravene the parenting order again*". Before ordering a bond, the Court must consider the parties means to deposit an amount of money in the Court. If the Court

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[7] *S E T v C J T* 18 July 2006, FAM-2006-019-386 Family Court at Hamilton per Judge Riddell.
[8] At [29].

decides to order a bond, the bond must specify the amount to be deposited and the conditions, the breach of which may lead to some or all of that money being forfeited to the Crown.[9]

[26] Under s 70(4) the Court has a discretion to direct that some or all of the bond is forfeited to the Crown taking account of the reason the bond was imposed, the extent to which the conditions have been met or breached, any explanation for the breach and any other matters the Court considers relevant.

[27] At paragraph 44 of the submissions in support of the application for a bond Mr [Scott] pointed to four breaches Ms [Carter] was said to have committed. They were:

(a) Mrs [Smith] Snr (Ms [Carter]'s mother) has been present at changeovers in breach of Condition 2(b) of Judge Coyle's orders. It was said in the submissions but not in evidence, "*it still continues to occur*". Ms [Carter] had responded to the allegation that her mother was present at drop-offs at paragraph 1 of her affidavit sworn 9 September 2020.[10] She gives explanations for both of those occasions. There is no evidence that a further breach has occurred recently and the validity of her explanations have not been tested by way of cross-examination. I do not consider these alleged breaches on their own would be sufficient to justify a requirement to pay a bond in the absence of evidence that they were a regular occurrence.

(b) The second allegation is that Ms [Carter] and her husband had been abusive towards Mr [Scott] and his partner, which is said to be in breach of Condition 2(f) in Judge Coyle's parenting order. Condition 2(f) provides "*both parents shall ensure that they communicate politely and respectfully in front of [Aaron], and that they and their respective families speak positively about the other parent at all times*". It is an important condition and it is important that it is complied with.

[9] Section 70(2) and (3).
[10] There are two paragraph 1's in the affidavit, the relevant passage is in the second paragraph 1.

However, in her affidavit sworn 16 December 2021, Ms [Carter] denies that she has abused Mr [Scott]. I am not in a position in a submissions only hearing to determine whether Ms [Carter]'s account or Mr [Scott]'s account is the correct one.

(c) Mr [Scott] claims that [Aaron] has reported to him that Ms [Carter] had told [Aaron] to speak with lawyer for the child and request changes to the care arrangements. Mr [Scott] says this is also a breach of Condition 2(f) of the parenting order. Again, in her affidavit of 16 December 2021, Ms [Carter] denies that she has said this to [Aaron]. Again, I am not in a position to determine the truth without cross-examination.

(d) Finally, Mr [Scott] says that [Aaron] has been treating his partner, Ms [Greerton], "*in a disrespectful manner*" and that [Aaron] has said that he has been told by his mother to behave in that way. Again, Ms [Carter] has denied the allegation that she has coached or encouraged [Aaron] and again I am not in a position to determine whether it is true or not.

[28] I therefore do not consider that I am in a position to direct that a bond be paid.

[29] I am also concerned that the application may have been misconceived. The submission that the bond was "*to prevent her from unnecessarily filing more unwarranted applications in the Court regarding [Aaron]*" seems to indicate that the bond was not being sought to prevent future breaches of the Court order but rather to prevent further unnecessary or vexatious applications being made. The procedure is s 70 is not the appropriate mechanism to address those concerns.

Costs

[30] Under s 142 of the Act the Court retains its discretion to make "any order of costs it thinks fit".

[31] The provisions of r 207 of the Family Court Rules apply, leaving the Court with its discretion to determine the issue of costs. The Court may of course take into account the principles in r 14.2 to 14.12 of the District Court Rules (DCR).

[32] Fundamentally, costs should follow the event. The party who succeeds in relation to an application should be entitled to expect payment of costs from the party who fails. Costs should generally be awarded in accordance with the daily rates and schedules contained in r 14.2, 14.3, 14.4 and 14.5.

[33] The Court also had a discretion to award increased or indemnity costs but if intending to do so it should take account of the guideline principles set out in r 14.6(3) of the DCR.

[34] However, in all decisions under the Care of Children Act the welfare and best interest of the child must be the first and paramount consideration.[11] Mr [Scott] has succeeded in relation to his application to have parts of the affidavits and exhibits removed. He has failed in relation to his application for an order that a bond be paid. Taking account of the interests of [Aaron] and taking into account the fact that his mother appears to have limited financial resources to meet any award of costs, I do not consider that it would be appropriate for Ms [Carter] to be required to pay Mr [Scott] costs in respect of those interlocutory applications.

[35] However, I have already observed that this application that is not one that ought to be have been brought by way of without notice application. It was also not appropriate for it to be brought within two years of the making of the final order by Judge Coyle. It is clear that Ms [Carter] is primarily seeking to relitigate issues that were already decided by Judge Coyle. The evidence that she has filed does not disclose any significant changes which would justify disturbing the current orders which represent continuity and [Aaron]'s care, development and upbringing.[12]

[36] There is nothing that she has raised that impacts [Aaron]'s safety.[13] There does not appear to have been a change in [Aaron]'s circumstances, nor in the way the parties

[11] Section 4 of the Act.
[12] Section 5(d) of the Act.
[13] Section 5(a) of the Act.

relate to each other, that impacts on [Aaron]'s care, development and upbringing, on the level of consultation and cooperation between his parents (regrettably there is still very little) or on the continuity of his relationship with both of his parents and family group. There is nothing about ss 5(b), (c) and (e). I do not consider that s 5(f) is relevant in the context of Ms [Carter]'s current applications.

[37] It follows that Mr [Scott] opposition to Ms [Carter]'s application for leave to commence proceedings was justifiable and would have succeeded but for the passage of time.

[38] It is also in [Aaron]'s interest that he be kept safe from unnecessary conflict between his parents. This includes filing Court applications without justification. Such applications invariably increase the tension between parents and expose children to risk of conflict.

[39] I am concerned about Ms [Carter]'s ability to pay and about the possible and consequent impact on [Aaron] of any financial hardship. However, it is important that there is a meaningful consequence for the filing of a without notice application that should not have been filed.

[40] Ms [Carter] is to pay costs on a 2B scale to Mr [Scott] in relation to the opposition to the application for leave to commence these proceedings. The respondent is to prepare a schedule of those costs and any recoverable disbursements and if there is any dispute about any items on the schedule it can be referred to me in chambers. The schedule is to be filed on or before 12 April 2022.

Signed at Auckland this 2nd day of April 2022 at 5.30 pm

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Judge K Muir
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 02/04/2022