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

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM-2024-092-000406
[2024] NZFC 10528

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[NIC DARBY] Applicant
AND	[ROBIN LOREN] Respondent

Hearing:	24 July 2024
Appearances:	J Harland for the Applicant J Moore for the Respondent L Reed Lawyer for Child
Judgment:	15 August 2024

REASONS JUDGMENT OF FAMILY COURT ASSOCIATE J NIEMAND

Introduction

[1] When this proceeding was before me for a directions conference on 24 July 2024, I made an interim contact order[1] by consent, pursuant to which the parties' 1½ year old son [Jace] would have contact with his father on the following terms:

(a) Through [child care centre – name deleted] on Wednesday and Thursday in the weeks commencing 22 and 29 July 2024, between 9.30am and 11am each day;

(b) Following these four sessions of contact, from Sunday 4 August between 10am and 5pm, continuing weekly until the roundtable meetings anticipated in October 2024;

(c) Mr [Darby] to undertake [Jace]'s transport for the contact;

(d) The order was conditional on the parties communicating politely to one another during change over, and otherwise communicating via "App Close", including about guardianship issues for [Jace].

[2] In the memoranda filed prior to the conference, counsel queried the possible options for progression of the file, dependent on whether the conference would be presided over by a Family Court Judge or a Family Court Associate. During the conference before me, counsel's submissions sought the making of orders, but with counsel indicating some uncertainty in their own minds about whether my jurisdiction extended to the making of these orders. That was particularly so because both parties (albeit to different extents) have raised issues in their pleadings against the other relevant to [Jace]'s safety, and this in turn raised the question of whether orders could be made by a Family Court Associate without a hearing first taking place. The

[1] Although the consent memorandum filed prior to the conference proposed that the order include a term for [Jace] to be in the day-to-day care of his mother at all other times, no order was made as to day-to-day care. In the course of the conference, it was accepted that it would not be possible to make such an order in favour of Ms [Loren] without certain factual determinations relevant to [Jace]'s safety in her care occurring first. Thus, following the approach endorsed by the High Court in *Johnson v Johnson* [2017] NZHC 1564 and being satisfied that the making of the order sought as to contact was clearly in the child's welfare and best interest, an interim order was made as to contact only.

uncertainty that I have highlighted is no criticism of counsel, given that the Family Court Associate role was established and implemented relatively recently, and where the extent of the Family Court Associates' jurisdiction is not always immediately clear from the primary and subordinate legislation.

[3] My judgment delivered orally to the parties on 24 July 2024 provided them with the benefit of an outcome and an interim order. This judgment sets out my reasons for determining that I had jurisdiction to make the orders sought, and thereafter my reasons for making the interim parenting order as sought.

Background

[4] Mr [Darby] started this proceeding with an application for a parenting order seeking contact with [Jace], who was then aged 9 months. His evidence was that a mediated agreement was reached in September 2023 (albeit an agreement that he felt forced into) pursuant to which certain contact was to occur. Afterwards, however, contact had been unable to get off the ground for a variety of reasons, which he attributed to Ms [Loren]. He was eager for the court to deal with the matter quickly, noting that at age 9 months, [Jace] had not seen him since he was 5 months old. This meant, Mr [Darby] said, that he had missed out on nearly half of his son's life.

[5] Relevantly, Mr [Darby] also deposed evidence of having suffered from depression, aggravated by Ms [Loren] using physical abuse (smacking and slapping) against him on four occasions. It was also his evidence that Ms [Loren] had a temper and had admitted to hitting Mr [Darby]'s older child.

[6] In her response to the application, Ms [Loren] denied having a temper and she denied hitting Mr [Darby]'s older son. Ms [Loren] did not answer Mr [Darby]'s allegations that she had smacked or slapped Mr [Darby]. She disagreed largely with the sentiments that Mr [Darby] expressed in his evidence, and in fact considered that it was Mr [Darby] who was controlling and emotionally abusive. Ms [Loren] denied obstructing contact. As she put it: "*The door was always open for the applicant to*

have contact with [Jace]". Ms [Loren] also provided affidavit evidence of the applicant becoming aggravated during a contact changeover.

[7] It is apparent from the respective affidavit evidence that the parties have some distance to bridge if they are to reach agreement on final care arrangements for [Jace]. That notwithstanding, and to their credit, they have reached an interim consent position outlined above.

General legal framework

[8] The law that I must apply in cases concerning care arrangements for children is found in the Care of Children Act 2004 ("COCA"). This Act provides that I must, as a person exercising powers under the Act, place the best interest and welfare of the child or children in the proceeding as the first and paramount consideration. How I am to do that is, in part, structured in s 5 of the Act. Section 5(a) provides that I must act in a way to ensure that the child or children's safety is protected, and so that they are protected from all forms of violence. I must also ensure that the child or children can participate in the proceedings, and finally also consider the remainder of the principles contained in that section. The individual weight that I give to each of those principles will be determined by the circumstances of each specific case.

[9] The role of Family Court Associates came about through the enactment of the Family Court (Family Court Associates) Legislation Act 2023 (which I will refer to as "the amendment legislation"). Amongst other things, the amendment legislation resulted in the inclusion of a "schedule" in the Family Court Act 1980. Family Court Associates derive their general jurisdiction primarily – but not solely – from the provisions in that schedule.

[10] Family Court Associates are empowered by the Family Court Rules ("FCRs") to preside over a number of conferences in COCA proceedings. When I am dealing with matters at a directions conference, issues conference or pre-hearing conference, then r 175D of the FCRs applies.[2] Rule 175D(2)(j) empowers me to make an order at a conference that I would otherwise have been entitled to make at a settlement

[2] Pursuant to FCRs, r 416W(5A).

conference pursuant to r 179. I acknowledge at the outset that r 179 does not apply to COCA proceedings (except in a very limited way), but that creates a relatively small gap in the rules, which I consider I can bridge through the use of r 15[3], as doing so would be both consistent with r 3 of the FCRs as well as the principles in s 4 of COCA.

[11] The schedule resulting from the amendment legislation does not include the power to make orders that would typically be made at settlement conferences in COCA proceedings.[4] But in COCA, settlement conferences are governed by s 46Q of the Act. That section provides as follows:

> **46Q Settlement conferences**
>
> (1) At any time before the hearing of a proceeding,—
>
> **(a)** a Family Court Associate may convene a settlement conference; or
>
> **(b)** a Family Court Judge or Family Court Associate may direct the Registrar of the court to convene a settlement conference.
>
> (2) However, a settlement conference may be convened under subsection (1) on 1 occasion only, but may be adjourned at any time and to any place.
>
> (3) At a settlement conference, a Family Court Associate or Family Court Judge may, with the consent of the parties, make an order settling some or all of the issues in dispute between the parties.
>
> (4) Before a party consents to the making of an order, a Family Court Associate or Family Court Judge may advise that party to obtain legal advice.

[12] Thus, on its face, s 46Q enables a Family Court Associate to make, if everyone agrees, "an order settling some or all of the issues" in dispute between the parties. When s 46Q is analysed carefully, I consider that the following salient points arise:

(a) The section provides jurisdiction for the making of "an order". In contrast to other provisions contained in relevant legislation where Parliament has seen it fit to place limitations on the powers and

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[3] Rule 15 provides, broadly speaking, that if a matter arises that it not specifically covered in the law or the rules, then I must utilise another rule dealing with similar matters if that can be done, or if it cannot be done, then I have a broad discretion to decide how to deal with the matter in light of the purpose of the FCRs.

[4] Specifically, orders pursuant to ss 46R, 48 and 56 of COCA.

jurisdiction available to a Family Court Associate[5], no such limitation arises in s 46Q.[6]

(b) When "an order" is made through the gateway provided by s 46Q, it can be an order to settle "some" or "all" of the disputed issues between the parties, suggesting the making of an interim order if some issues are settled, or the making of a final order if all issues are settled. That implies a clear intention by Parliament that jurisdiction arises under this section for a Family Court Associate to make orders which, in this proceeding, would have to be an interim or final parenting order under the Act.

(c) No distinction is made in s 46Q as to the orders that may be made by a Family Court Judge or a Family Court Associate. On the contrary, a plain English reading of the section suggests that the powers and functions of a Family Court Associate in the context of a settlement conference is identical to that of a Family Court Judge.

(d) If jurisdiction did not exist for a Family Court Associate to make the types of orders typically sought by parties at a settlement conference, then the consequence would be a need for the referral of their consent memorandum to a Judge in chambers. However, that Judge will not have had the benefit of hearing the discussions that occurred in court and which led to the consent position and shaped the terms of the consent reached. It would risk an outcome where the parties are required to return to court to make further submissions, with additional delay and costs to the parties (and the state). That proposition does not fit easily with the purpose of the Act[7] in light of which the Act must be interpreted[8], or with the purpose of the FCRs in light of which

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[5] Family Court Associates, for example, are expressly excluded from exercising any judicial or administrative function in proceedings under the Oranga Tamariki Act.

[6] It can, however, reasonably be implied that it must be an order that can otherwise be made pursuant to COCA, which is the primary legislation under which the proceeding arises.

[7] COCA, s 3

[8] Legislation Act, s 10(1)

procedural decisions must be made[9], or the need to resolve proceedings in an appropriately timely manner in light of the circumstances of the case.[10]

[13] Conversely, flowing from the analysis above, I am likewise bound by the same obligations as a Family Court Judge to consider and apply s 4 of the Act. This requires me to place the child or children's best interests and welfare as the first and paramount consideration, and to take into account not only the principles contained in s 5 of the Act, but also any other matters relevant to the child or children's welfare and best interests.[11] Like a Family Court Judge, I am therefore required by the Act to consider, in addition to any other relevant matters,[12] whether the agreed or consented orders that are proposed:

(a) Will result, as it must without exception, in the children's safety being protected, including from all forms of violence (as defined in sections 9(2), 10, and 11 of the Family Violence Act 2018) and from all persons, including members of the child's family, family group, whānau, hapū, and iwi;

(b) Places in the hands of the children's parents and guardians the primary responsibility of their care, development, and upbringing;

(c) Gives effect to the children's care, development, and upbringing being facilitated by ongoing consultation and co-operation between their parents, guardians, and any other person having a role in their care under a parenting or guardianship order;

(d) Affords continuity to the children in their care, development, and upbringing;

[9] FCRs, r 3
[10] COCA, s 4(2)(a)
[11] Care of Children Act, s 4(4)(b)
[12] COCA, s 4(4)(b)

(e) Provides the children with a continued relationship with both of their parents, and preserves and strengthens their relationship with their family group, whānau, hapū, or iwi;

(f) Will result in the children's identity (including, without limitation, their culture, language, and religious denomination and practice) being preserved and strengthened;

(g) Reflects the mandatory requirement for the children to have had reasonable opportunities to participate in any decision affecting them.

[14] Finally, for the sake of completeness, I record that I do not overlook Rule 10A of the FCRs, which is clear that the rules do not confer jurisdiction on me to "hear and determine a substantive application (whether made on notice or without notice) unless authorised by the Act under which the application is made". However:

(a) The FCRs, as secondary legislation, are subordinate to statute.

(b) The Court does not "hear and determine" a substantive application at a settlement conference, or any other sort of conference for that matter.[13] Whilst true that it must "determine" whether to make the orders sought by consent with reference to relevant legal principles, it does not "hear" the application. "Hearings" in the context of COCA proceedings are specifically defined in Rule 416B as a defended hearing, submissions-only hearing, formal proof hearing or any other form of hearing as directed by the court. Settlement conferences, directions conferences, issues conferences and pre-hearing conferences are therefore not forums for a court to "hear" an application.

(c) The Act, as already noted, contains a broad power in s 46Q for the making of "an order" (without limitation as to jurisdiction) to resolve a

[13] There is an exception to this general rule found in r 416Z(3), which enables the court to treat a directions conference as a hearing, and then determine an application in the absence of a response within the timeframes provided by the FCRs. However, as is apparent from the rule, this is only possible because the conference is specifically treated as a hearing rather than a conference.

proceeding by consent at a settlement conference, including on a final basis.

(d) As a matter of statutory interpretation, the specific provision – as contained in s 46Q – would prevail over the general legislation, being Schedule 2 of the Family Court Act 1980, which resulted from the amendment legislation.

Application to the present case

[15] In this case:

(a) I accepted the submission from counsel that the issue of violence raised against Ms [Loren] (albeit disputed) is one that I am not convinced can be dealt with purely through conditions. It includes allegations of physical abuse against Mr [Darby] and his older child. In due course, those allegations will need to be formally determined by the court.

(b) On the other hand, the allegations raised against the applicant father are not ones that, I consider, are ones that preclude the making of the order without first having a hearing to determine the allegations. Putting it in a different way, they are such that even if they did occur, can be managed appropriately through the making of conditions.

(c) In this case, the consent order contains a condition that governs how the parties are to interact with each other during changeovers and how they are to communicate away from changeovers. There is no suggestion in the evidence that Mr [Darby] has used physical violence or that he is violent in nature to the extent that [Jace] would be exposed to a risk of violence, or his safety otherwise jeopardised in Mr [Darby]'s care. It is also hugely significant, in my view, that Ms [Loren] supports the making of an order for [Jace] to be in Mr [Darby]'s unsupervised care. I therefore concluded that the orders that I made would not compromise [Jace]'s safety.

(d) Once I had reached that conclusion, I had little difficulty concluding that the making of the order is otherwise in [Jace]'s best interest and welfare, particularly as it enables [Jace]'s relationship with his father to be strengthened and preserved, thus strengthening, and preserving his identity as well as to start to provide a sense of continuity in the arrangements for [Jace] to spend time with both his parents.

(e) It is significant that [Jace] had not, so far, been able to have a reliable relationship with his father, as is his right. Although the reasons for that remain to be determined, an interim order specifying the terms of contact would afford a much greater degree of certainty than would be available without an order. This, I find, promotes continuity in the relationship between [Jace] and his father (and paternal family) and which, over time, will strengthen and preserve those relationships and [Jace]'s identity alike.[14]

Accordingly…

[16] For those reasons, I made the interim parenting order sought.

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Family Court Associate J Niemand
Kaiwhakawā Tuarua o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 15/08/2024

[14] This therefore meets the principles in ss 5(d), (e) and (f) of COCA.