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IN THE FAMILY COURT
AT CHRISTCHURCH

FAM-2004-009-000552
[2016] NZFC 4436

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	DILLAN WHEELER Applicant
AND	SANDRA PAGETTI Respondent

Hearing:	In Chambers
Appearances:	On the papers
Judgment:	1 June 2016

IN CHAMBERS JUDGMENT OF JUDGE E. SMITH
[AS TO INTER-PARTY COSTS IN COCA AND DV PROCEEDINGS]

The Application

[1] This is an undefended indemnity costs application by the respondent ("Mother") against the applicant ("Father"). At all material times Mother was legally aided. Father was at times represented by counsel and at other times was not.

[2] Mother seeks a costs award on an indemnity basis to cover her costs of $6,081.92 being the total costs rendered to the Legal Services Agency, which Mother is to repay. Father has failed to file any submissions as to costs as directed.[1]

Issues

[3] Two issues present, namely:

(a) Should costs be awarded against Father; and if so

(b) What ought to be the quantum of any award.

The Proceedings

[4] There has been a plethora of proceedings between the parties with respect to their daughter June. Those, however, for which Mother now seeks a costs determination are limited to:

(a) A s 77B COCA application suspending order preventing removal ("OPR") of child from New Zealand brought by Father, filed **15 September 2014**;

(b) A s 56 COCA application for variation of a parenting order application brought by Mother, filed **24 February 2015**;

[1] The Court has tried to ensure Father is aware of the proceedings and his need to file submissions in circumstances where he appears to have left the country or otherwise disappeared and has not advised the Court or counsel or Mother of his whereabouts or exact address for service. In such circumstances the Court has served at his multiple prior advised addresses for service – see the Court's Minute of 3 February 2016 and as outlined at paragraph [14] of my decision of 22 February 2016.

(c) A s 14 application for protection order under the DVA brought by Father against Mother and her husband, filed **1 April 2015**;

(d) A s 68 COCA application relating to contravention and admonishment brought by Father against Mother, filed **24 April 2015**;

(e) A s 56 COCA application for variation of parenting order brought by Father, filed **13 May 2015**;

(f) A s 46R COCA application to determine dispute between guardians brought by Father, filed **3 June 2015**;

(g) A r143 FCR application for discovery against non-parties (the child's school(s)) brought by Father, filed **29 June** and **2 July 2015**.

The Law

(i) Care of Children Act proceedings 2004

[5] It is clear there is jurisdiction for the Court to make an award for costs in Care of Children Act proceedings pursuant to s 142 of that Act which provides:

> **142 Costs**
>
> (1) In any proceedings under this Act, the Court may make any order as to costs it thinks fit.
>
> (2) An order under this section may be made either in addition to, or instead of, an order under section 71 or section 87 or section 121.
>
> (3) This section is subject to sections 131 and 135.

[6] In that regard, I consider the law remains as outlined by my decision of *AHM v EAD*[2] paragraphs [7] to [9] and [11] in which I said (albeit now the District Courts Rules have been amended so that rules 14.2 to 14.12 apply):

> [7] There is clearly jurisdiction for the Court to award costs. Section 142 of the Care of Children Act 2004 provides:

[2] 16 March 2010, FC Christchurch, FAM-2007-009-001579.

142 Costs

(1) In any proceedings under this Act, the Court may make any order as to costs it thinks fit.

(2) An order under this section may be made either in addition to, or instead of, an order under section 71 or section 87 or section 121.

[8] Rule 20 of the Family Courts Amendment Rules (No 2) 2009 (SR 2009/292) amended previous rule 207 of the Family Courts Rules which now provides:

207 Costs at discretion of Court

(1) The Court has discretion to determine the costs of—

(a) any proceeding:

(b) any step in a proceeding:

(c) any matter incidental to a proceeding.

(2) In exercising that discretion, the Court may apply any or all of the following DCRs, so far as applicable and with all necessary modifications:

…

Should the Court award costs?

[9] While there is jurisdiction to award costs, it has long been emphasised that costs awards are discretionary in family law matters and do not always follow the event of success in favour of the successful party. While there remains potentially a differing view as to whether or not costs ordinarily should follow success in family law statutes, I prefer an approach in such matters that highlights the Court's discretion to award in the first place. In assessing whether or not to exercise the discretion to award costs, the Court should have regard to all relevant matters but particularly in cases involving childcare and/or child protection, such matters ought to include (but not exclusively) the following, namely:

(a) The overriding need to ensure effect is given to the paramountcy principles in section 4 of the Care of Children Act 2004 if applicable;

(b) The object of the legislation;

(c) The disputes in question;

(d) The way the parties and their advisors conducted the proceedings;

(e) The means of the parties;

(f) The actual cost incurred by the parties;

(g) The overall interests of justice;

(h) A need to be mindful that a genuine and reasonable litigant ought not to fear an award of costs and given the inquisitorial jurisdiction it is important all relevant arguments are heard.

…

[11] One of the reasons why traditionally costs have not followed the event of success in family law matters and particularly those involving children is because welfare arguments can be finely balanced and legitimate positions argued by both parties, and given the inquisitorial nature of the proceedings genuine arguments should always be able to be considered. Parents often raise arguments or positions that ought properly to be heard and determined by a Court and although ultimately unsuccessful, it cannot be said in general terms the arguments were unmeritorious in being raised for consideration. Equally, there are occasions in family law matters particularly those involving children when a party's position may be significantly unmeritorious on any view.

[7] Albeit more recently, however, in a matter involving a costs appeal, Priestley J quashed an order made by the Family Court Judge for costs of $6,105.00 in a COCA matter saying, having identified the merits were comparable[3]:

[16] In awarding costs it is clear High Court and Court of Appeal authority that Family Court Judges need to give consideration to the impact of a costs award on the parent and thereby on the welfare of the children involved. As a general rule of thumb, in the absence of behaviour which has led to protracted litigation, a reasonable stance is, or general obdurateness, finely balanced cases do not usually attract costs.

[17] I also observe, although it is ultimately a matter for the Rules Committee and the profession, that arguments can be made that general scheme of costs, as described under the District Court Rules 2009, might not necessarily be suitable across the board for Family Court litigation. Some consideration may be given to a separate costs regime for the Family Court.

[8] Further, recently in *H v M*[4] Keane J emphasised a consideration of the child's interests remains completely apposite in cost applications where he said at paragraphs [8] to [10]:

…

Costs principles

[8] Section 142(1) of the Care of Children Act 2004 says rather than "In any proceeding under this Act, the Court may make any order as to costs it thinks fit"; and in *Hawthorne v Cox* the Court of Appeal expressed the

[3] *PRH v CTB* (CIV-2011-419-1739, Hamilton, Priestly J)
[4] *H v M* [2015] NZHC 3264 (16 December 2015

> preliminary opinion that any award must be consistent with the s 4 principle making the welfare of the child "the first and paramount consideration".
>
> [9] In that case the Court endorsed Panckhurst J's conclusion at first instance that, when deciding whether to make a costs award and in what amount, it is necessary to assess what impact an award would have on the parents and their ability to care for the child and to work co-operatively in the child's best interests; and as he said, the impact of an award can be more than economic.
>
> [10] Furthermore, as he said also, parents, acting in the interests of their children, and who seek the Court's assistance, should not be inhibited by the risk of a costs award. An award should be reserved for the case where a parent pursues litigation unreasonably without regard to a child's interests.

[9] Not only is it discretionary whether or not Court awards costs, so is the level of any costs awarded similarly discretionary. With respect to the discretion as to quantum and whether or not costs ought to be awarded by scale, I similarly refer and adopt my comments I formulated in *AHM v EAD* at paragraphs [17] to [21] where I said:

> **What ought to be the quantum of costs awarded to the respondent in these circumstances?**
>
> [17] There remains a continuing, debate with opposing High Court authority as to whether in circumstances where the Court does exercise its discretion to award costs whether the quantum ought to be in accordance with "scale" under now rules 4.1 to 4.12 of the District Court Rules 2009 or whether the "scale" ought to be but a tool in determining ultimate quantum because of the diversity of factors and situations within the Family Court context that render a Family Court Judge to retain full discretion not only as to award of costs but the quantum thereof.
>
> [18] There are powerful reasons for invoking this scale such as the advantages of consistency, predictability and transparency. Balanced against that are again the diversity of facts and situations and the wide ranging considerations that can be applicable in family law circumstances where answers to legal questions may not necessarily be obviously black or white or right or wrong and therefore the unfettered discretion to award not only costs but at a level deemed fit by the Court ought to be preserved.
>
> [19] Randerson J in *Radisich v Taylor* (albeit in considering the then rule 45 DCR 1992 the predecessor to now rules of the DCR 2009) in considering how the question of costs was to be fixed in Relationship Property Act 1976 matters said:
>
> > [19] Rule 207(a) provides that r 45 District Court Rules applies to proceedings in the Family Court "so far as applicable and with all necessary modifications". Rule 45 deals with costs. The only other rule relating to costs in the Family Court Rules is r 238 which provides that the costs of an application are in the discretion of the

> Court and if allowed, are costs in the proceedings unless the Court or the Registrar orders otherwise. While r 238 on its face appears to give the Court a broad discretion, it must be read in the light of r 207 which imports the District Courts Rules in relation to costs.
>
> ...
>
> [23] But the legislative intention is also clear that, in proceedings in the Family Courts, costs are to be dealt with in accordance with the District Courts Rules as applicable and with all necessary modifications, subject, of course, to any contrary statutory provision. It follows that the authorities dealing with the costs rules in the general courts are also applicable to proceedings in the Family Courts, as Harrison J found in Anderson.
>
> [24] The decision of this Court in *L v W* (above) was given in 2003, prior to the introduction of the new costs regime for the District Court with effect from 1 February 2005. It must therefore be considered in that light, and in the light of the principles established later by the Court of Appeal in *Holdfast*.
>
> [25] Applying the principles enunciated in *Holdfast* to the present case, the correct approach for the Judge to have adopted was:
>
> > a) to select the appropriate category for the various steps in the proceeding under r 47 and the appropriate band under r 47B and Schedule 2A District Court Rules.
> >
> > (b) Having arrived at the appropriate scale costs, to consider whether to award increased costs or indemnity costs under r 47C.

[20] The application of scale costs by reference to appropriate daily recovery rates and determination of reasonable time as now provided in the District Court Rules 2009 (see Rule 4.4 and 4.5 thereof) is itself able to be varied by an award of increased costs, indemnity costs or alternatively a reduction or refusal of costs (refer rr 4.6 and 4.7).

[21] Section 142 of the COCA tends to support a wide discretion both as to whether costs ought to be awarded and if so, the quantum to be fixed. There may be good reason why "scale" costs ought not to apply to Family Court proceedings but a close look at rule 4.6 and 4.7 which permit increased costs, indemnity costs and reduced costs are wide enough to enable appropriate alteration to scale where a failure to do so would be unjust. This includes consideration of all matters of the type Heath J in *L v W* was concerned to ensure were balanced in a just cost award given the sometimes differing nature of family law proceedings. The advantage however of using "scale" as a starting point and then adjusting it appropriately in accordance with rules 4.6 or 4.7 is that the award is transparent, likely more predictable (at least at starting point) and removes possible arbitrariness. I consider the applicability of rules 4.6 and 4.7, where appropriate. enables the "custom fit" of costs awards for family law matters where that is demanded.

(ii) Domestic Violence proceedings

[10] The Domestic Violence Act 1995 is silent as to whether jurisdiction exists to make an award of costs but the cases have now accepted that there is clear jurisdiction for costs under this Act in Rule 207 of the Family Court Rules 2002 (FCRs) and my approach to costs under the domestic violence proceeding replicates that which I am undertaking in the COCA matter and as outlined in my decision of *NJT v CJT*.[5]

Background

[11] It is important to understand the background to the proceedings. I shall attempt to do so by some exploration as to the proceedings for which the applicant seeks costs, their nature and circumstances. I do so with some trepidation as there has become such a number of proceedings, it is difficult to outline all matters with reasonable brevity. To that extent I may have missed some matters. That said, I have attempted to outline the major matters and proceedings that are at issue in relation to those proceedings for which costs are sought (paragraph [4] hereof). This in itself has required an extensive trawling of voluminous materials.

Initial Orders

[12] Prior to May 2008 the Court made an order preventing June being removed from New Zealand ("OPR").

[13] After significant and intense proceedings a final parenting order was made by consent (during a defended hearing) on **1 July 2008** whereby June was agreed to be in the parties' shared care (2:2:5:5 basis).

[14] Thereafter there appears a period of procedural calm.

[5] N*JT v CJT* (FC Christchurch FAM-2012-009-002124) paragraphs [5] to [6].

Mother applies to suspend OPR – January 2011

[15] However, in **January 2011** Mother applied to suspend the OPR to enable her to take June on a family holiday to the USA. Father defended that application. After significant litigation Mother was successful and on 6 March 2012 the Court suspended the OPR and granted Mother's application. Despite Father's huge litigation effort to prevent that, he did not in fact attend the final hearing.[6]

Father applies to have primary care of June – September 2011

[16] Father filed an application for variation of the final parenting order in September 2011 seeking primary care of June. Mother defended that application. It was set for fixture on 6 March 2012 (simultaneously to the discharge of the order preventing removal as outlined in paragraph [15] hereof). Father did not appear. That application was finally determined on 13 August 2012, Father seeking to discontinue the application.

[17] Matters might be said to have again generally settled thereafter for a period. Then, however, from March 2014 up until 2016 there were multiple applications.

Father seeks to have June attend counselling – March 2014

[18] On **28 March 2014**, pursuant to s 44 COCA Father sought to determine what he thought was a dispute between guardians, he wanting June to have counselling/psychological intervention assessment. Mother disagreed and filed a defence. Father eventually filed a notice of discontinuance (Judge Murfitt noted on 11 November 2014 when the notice of discontinuance was received, that it seemed to be that June herself was opposed to meeting with a counsellor anyway).

[6] See decision Judge E Smith 6 March 2012, FC Christchurch, FAM-2004-009-000552.

Father seeks to suspend the OPR – September 2014

[19] On **15 September 2014** Father then applied (without notice) pursuant to s 77B of the Care of Children Act seeking an order suspending the OPR to take June overseas for a holiday. That was placed on 10 days notice.

Mother applies to vary the parenting order – February 2015

[20] During the course of Father's application of September 2014 to suspend the OPR, Mother became aware that Father had secured employment which often took him outside of the Christchurch area and rather than return June to Mother, he maintained the 2:2:5:5 care arrangements by placing June with family friends or others. Mother took the view that it would be no problem for June to simply come home to her when Father was away for such periods of time. While Mother was prepared to weather that for some time, she thought the arrangement was becoming elongated to an extent that it was compromising June's extra-curricular activities and school attendance.

[21] Accordingly Mother applied on **24 February 2015** pursuant to s 56 of the Care of Children Act 2004 to vary the order of 2008 simply to enable June to come to her home if Father was going to be out of Christchurch for an elongated period of time rather than placed with friends and family and the shuttling of her care that was, in Mother's view, occurring.

[22] Father filed a notice of response (20 March 2015) to Mother's application for variation, in general terms saying only odd occasions she slept over at others and when she did, she was happy.

Father applies to be June's representative DVA – March 2015

[23] Further on **19 March 2015** (on a without notice basis), Father applied for a protection order against Mother on the basis that he wished to be appointed a

representative for June against Mother. That was placed on notice by the Court, there being insufficient evidence to justify a without notice application.[7]

Father applies for a protection order against Mother and Mr Pagetti – April 2015

[24] On **1 April 2015** Father (this time himself being the applicant and not as a representative of June) applied (again without notice) for a protection order naming Mother as the respondent and her husband Kev Pagetti as an associated respondent. The affidavit in support made wide ranging and sweeping allegations of violence, much of which was historic. The affidavit itself is difficult in places to follow in terms of context, dates and times. It is not always broken down sufficiently by paragraph nor does it have meaningful detail as to the exact material allegations. In other parts it is highly detailed, but often not about material matters, and without obviously explaining the alleged domestic abuse. In any event, on the E-duty platform Judge Mackenzie placed that application on notice, the Judge noting that Father had not disclosed in his without notice application that he had applied for a protection order as a representative of his daughter as recently as 19 March 2015 and that application was to proceed on notice.

[25] Mother duly filed a defence to Father's applications for a protection order, claiming in particular the application did not disclose any basis for the protection order but rather went over mainly historical allegations that were never substantiated or were resolved in previous litigation over a number of years. Mother particularly pointed out in her response that the application for a protection order seemed to confuse matters of domestic violence and issues relevant to proceedings under the Care of Children Act.

Father applies for enforcement orders – April 2015

[26] Father then filed an application on **22 April 2015** pursuant to s 68 (again without notice) for orders relating to contravention, claiming Mother had breached the parenting order. This was duly defended by Mother. There were absolutely no

[7] See Judge Johnson's Minute 19 March 2015

grounds to proceed without notice and the application was ordered to proceed with notice.

Mother applies to strike out Father's application for a protection order against her – May 2015.

[27] Mother was adamant that Father's protection order application disclosed no basis whatsoever for a protection order, saying it did not disclose any real specific allegations, and those allegations that were made she considered ill-founded and with no real evidential basis whatsoever. Mother was so concerned regarding the contents that on **12 May 2015** she made an application pursuant to r 193 FCRs to strike out Father's application for a protection order, which Father duly defended.

Conference in respect of Mother's application for a parenting variation – April 2015

[28] The first substantial conference regarding Mother's application for variation (see paragraph [20] hereof) was held before Judge McMeeken on **22 April 2015**.[8] It is clear from the Court's Minute that Mother would simply have accepted settlement by confirmation from Father that if he was going out of town to work that June would stay with Mother. Judge McMeeken's Minute however, details the difficulty she was having getting Father to focus on matters at hand and that he would not answer the Court's questions about his work out of town, with Father wanting Mother to prove that he was working out of town and June staying with others. The Judge noted this was odd given Father acknowledged that this was occurring.

Father applies to vary the parenting order to 50/50 shared care – May 2015

[29] On **13 May 2015** Father made a s 56 application for variation of the parenting order of 2008 seeking 50/50 shared care with June to be in his care on Monday, Tuesday, Wednesday, and Mother Wednesday, Thursday, Friday and alternative weekends with each of them with changeovers through the school. Again Mother defended the proceedings. On any view at the time this application was made, and at all times since, it was without merit.

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[8] See Minute of Judge McMeeken 22 April 2015.

Father's application to suspend OPR hearing – 21 May 2015

[30] On 21 May 2015 Father's application to suspend the OPR (see paragraph [19]) was to proceed by short cause fixture. I was the hearing judge.[9] Among the comments I made that day was indeed a concern regarding the plethora of court proceedings over the years. Further, Father had not specified any particular event or indeed any intended dates of travel so his application was lacking specific and while much had been agreed, there were some outstanding conditions before the parties completely agreed regarding a suspension of the order.

[31] Ms Gibson (who was counsel for June) also raised a number of concerns. She outlined to the Court that by that time (i.e. 21 May 2015) there were also the other applications before the Court i.e: a protection order against Mother; applications by Father for contravention of the parenting order; and variations to the parenting order sought (one application each by Mother and Father). Ms Gibson advanced such was the unusual nature and perhaps intensity and oddity of some of Father's allegations contained in those wide ranging proceedings, she was concerned that there ought to be an exploration as to whether or not there was in fact a "flight risk" by Father with June if the OPR was discharged or suspended. Ms Gibson was not at that time taking a final position, but rather considered vigorous testing of the evidence might be required. In addition, there had in fact been some prevarication prior by Father to provide reasonable details of the nature of the trip and where he might be which raised concern as to Father's intent. Ms Gibson sought a consolidation of all of the then proceedings and an adjournment.

[32] I agreed with Ms Gibson that caution was required and Father's suspension application could not be determined in isolation of all proceedings. I consolidated all the proceedings and reserved costs.

[33] Ms Gibson's concern of potential "flight risk" (and Ms Gibson put it no higher than this) at that time (May 2015) was possibly prophetic because as will be seen by August 2015 Father had in fact left New Zealand (suspected he may have gone to the USA) quite inexplicably (refer paragraph [44] below).

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[9] See Directions of Judge Smith 21 May 2015.

[34] About that Father had made overtures to Ms Gibson that he wanted to search her complete file. Ms Gibson believing her file privileged.

Father applies for third party discovery against [name of school 1 deleted] and [name of school 2 deleted] – June/July 2015

[35] In **June 2015** in the context of all the proceedings, Father then made a r 143 application for third party discovery against [name of school 1 deleted] (June's school). Father had sought material from the school prior to this which had not been provided and Father referred the matter to the Ombudsman. Father considered that information relevant to both his application for a protection order, defending Mother's application for a variation to the parenting order, and relevant to his application to travel overseas. Father made a similar application in July 2015 against [name of school 2 deleted]. Mother properly raised concerns about the relevance of the material sought.

Father applies to determine which school June should attend in 2016 – July 2015

[36] Father then made (again without notice) an application on **3 July 2015** for an order pursuant to s 46R – that is, he sought that the Court determine which school June would attend in 2016. He said he made that application without notice firstly to avoid delay and avoid pressure being placed on June.

[37] Judge Murfitt received that without notice application on the E-duty platform. He said:

> The application is refused as a without notice application. This is a completely inappropriate subject for urgent without notice procedure. The child does not start high school in 2016 and there is plenty of time for due process to take place. All applications are to proceed on notice. Mr Wheeler would be well advised to take and follow legal advice before pursuing third party disclosure about [name of school 1 deleted]. He could well be facing an order for full costs against him, at least in relation to that application.

[38] It was inconceivable that the application should have been made without notice.

[39] Mother quickly responded she had no difficulty with June going to [name of school 3deleted]. In fact there was never a dispute about it.

Father seeks transcript – August 2015

[40] By **August 2015** Father had sought a transcript of the abandoned fixture on 21 May 2015 (see paragraph [30]). I provided a Minute of 3 August 2015 indicating that no evidence was given so there was no transcript but there was audio of discussions and submissions. While pointing out that ordinarily such discussions are not transcribed, particularly given it is such a burden on court resources as to do so on each occasion would be significant. However, on that occasion I authorised a transcript of the discussion to be produced and a copy provided to all counsel in the hope that would help resolve whatever matters were concerning Mr Wheeler.

Timetabling Conference for all proceedings – 7 August 2015

[41] Judge Moran dealt with all consolidated matters on 7 August 2015.[10] In an effort to paraphrase her comments, orders and directions, the material matters appearing in Her Honour's decision included:

(a) A comment by Her Honour as to the "voluminous" state of the then proceedings and that she was concerned not only about the volume but the frequency in which proceedings were filed;

(b) The question of June's schooling in 2016 was readily resolved by consent with agreement she attend [name of school 3 deleted] and an order by consent was made to that effect. Her Honour made timetabling for costs on that matter as Mother's counsel had indicated that Father says in his originating application that was an agreement by the parties that June attend [name of school 3 deleted] in 2016 and Mother was put to the unnecessary expense of being involved in dispute proceedings when there was no dispute;

[10] See Minute Judge J Moran 7 August 2015 in its entirety.

(c) Father's application for discovery from [name of school 2 deleted] in relation to the dispute as to schooling in 2016 was struck out given matters were settled;

(d) Her Honour provided timetabling for Father to respond to Mother's application to strike out his protection order application(s) and the strike out application in that regard was set for a two hour submission only hearing with Father to file his affidavit in response by 12 August 2015, a two hour submission only hearing to be set with submissions five days prior to that fixture (that fixture was eventually set for 2 February 2016);

(e) With respect to Father's application for discovery against [name of school 1 deleted], counsel appeared for the school who submitted they were happy to provide the information, indeed much of it has already been provided and much through the auspices of discovery process through the offices of both the Ombudsman and the Privacy Commissioner. Judge Moran did not make an order in that regard, she did not consider it necessary and the matter was adjourned through to a case conference to determine if an ultimate order for discovery was required;

(f) The balance matters therefore were Father's contravention(s) applications and the two cross-applications for variation of parenting orders. It was clear that a s 133 report was required in relation to these proceedings as Judge Moran was of the view it was critical if there was to be any variation of the parenting order (then shared care 2:2:5:5) to be made in a way that meets June's welfare and interests. Judge Moran directed a s 133 report with Ms Gibson to confer with counsel and Father to prepare a brief and submit for approval within 10 days and those proceedings were allocated a Case Management Conference upon receipt of the s 133 report.

Father disagrees with the proposed s 133 brief

[42] In my view it was a simple matter for the s 133 brief by Ms Gibson to be formulated after consultation. She did so. Ms Gibson indicated that Mother approved the draft brief but Father did not. Father's reasons for not approving the draft brief for the s 133 report writer were that the contact set out in the original draft was wrong, June did not want to participate in the s 133 report and the lack of time to respond. I considered that contested matter in chambers on 19 August 2015. I considered there was ample time for Father to respond, the Court had already determined the report was necessary and the matters he raised in opposition were not material to the content of the brief. I approved the brief and it was to be commissioned on the terms as drafted by Ms Gibson. Father's opposition to the brief was wrong and caused cost and delay. For clarity I made it clear that the COCA proceedings were next to be called by Case Management Review after the s 133 report came to hand.

Mother's strike out (DVA) application hearing – 3 February 2016

[43] Mother's application to strike out Father's protection order applications was set for 3 February 2016. Present at that fixture were Mother and her counsel, the associated respondent (Mother's husband Mr Pagetti) and Ms Gibson. Inexplicably there was no appearance made by the applicant. It transpires that while Father had complied by filing (in accordance with Judge Moran's directions of 7 August 2015) on 14 August 2015 a document called "**Submissions and Affidavit in defence of Strike Out**", he had not served it on anyone else. That document on any view is troublesome. It runs to approximately 29 closely typed pages – with most pages without paragraph numbers although there are some headings. That document was not just submissions but included evidence. It had not been served on the other parties and it took counsel for Mother and Lawyer for Child somewhat by surprise and clearly they were not in a position to argue the strike out given the plethora of information Father had placed before the Court, none of which they had been appraised earlier. That aside, an extraordinarily unusual circumstance had transpired.

[44] While the fixture of 3 February 2016 was only to determine the strike out application on the protection order application, the information I heard from counsel regarding the COCA proceedings that day (3 February 2016) was disturbing. Counsel advised that despite Father's intense applications for the change of care of June, his determined quest for third party disclosure and the seeking of protection orders, that somewhat out of the blue in late August 2015 Father did not collect June from school and over successive days did not collect her. It transpires that a person whom the parties suspected in fact was Father, delivered to June's school all of her belongings. Since late August 2015 Father had not had June in his care at all. Neither had he contacted Mother orally or by writing or any other means to explain why he had acutely absented himself from June's life. This was distressing for Mother, particularly given the background and the intensity of his requests for contact, care and determinations as to schooling. No-one knew Father's whereabouts but suspicions were that he had gone overseas. If he had, as indicated above, (paragraphs [31] to [33]), Ms Gibson's concern for the Court to assess "flight risk" if it granted Father's application to suspend the OPR was warranted in terms of at least some rigorous exploration of his intent was required.

[45] In terms of the strike out application, Ms McNulty and Ms Gibson said they had filed their submissions on 2 February 2016 and sent them to Mr Wheeler via his email address and they had not been returned by any email notification.

[46] I commented in my oral decision of 3 February 2016 that while the strike out application of the DV proceedings was indeed extant, I considered the matter of foremost determination was to determine whether or not Father intended to prosecute all of his originating applications for protection orders and all the COCA matters.

[47] Materially, I provided directions including: Father to file within 14 days by memoranda written confirmation that he wished to pursue his application for a protection order or any of his applications under the Care of Children Act including the application for discovery against [name of school 1 deleted]; if he failed to file the same or did not wish to proceed, I would strike out his originating applications.

[48] The s 133 report (COCA proceeding) was to hand (Father having played no part in it) and accordingly I directed a Case Management Conference for all balance COCA proceedings at 11am on 22 February 2016 to be set down for an hour and indicated that if Father was not present, I may well strike out all of the balance of his proceedings for want of prosecution and debar him from defending any matters. I gave comprehensive directions for service of my Minute and Judgment of 3 February 2016.

Case Management Conference – 22 February 2016

[49] The proceeding was next called on 22 February 2016. Father had not responded to any of my directions of 3 February 2016, and accordingly I struck out his application for a final protection order. Also, given the Court had had no communications regarding his COCA proceedings, as indicated prior, given no response had been received from Father I struck out his applications for variation and contravention for want of prosecution and debarred him from defending any of Mother's COCA proceedings.

[50] The then only remaining matter was Mother's original s 56 application for variation (filed as long ago as 24 February 2015 – see paragraph [20] hereof). Mother had (then) only sought a very small variation so that June would come into her care if Father was out of town, matters had changed so cataclysmically – that is Father absenting himself likely from New Zealand without telling anyone where he is or what he is doing, against a background of previous intense interest – I granted the variation but in a significantly different way. Taking into account that extraordinary change of circumstances, Father's failure to take part in the s 133 report, sections 4, 5 and 6 of the Act, I reposed the day to day care of June in her mother. I did not provide any contact for Father indicating the Court would need to know a great deal more about Father's circumstances before such a decision could be made.[11]

[11] See decision Judge E Smith 22 February 2016.

[51] I struck out Father's third party application against [name of school 1 deleted] and provided consequential directions for the filing of any submissions as to costs. No submissions as to costs have been received from [name of school 1 deleted].

Outcome of all the proceedings

[52] For clarity, the outcome of the proceedings were as follows:

(a) Father's s 77B application for a suspension of the order preventing removal of June from New Zealand dated, 15 September 2014, was struck out;

(b) Mother was successful in her s 56 COCA variation application of 24 February 2015 – see paragraph [50] above;

(c) All of Father's applications for contravention orders (24 April 2015) and variation s 56 COCA 13 May 2015 were struck out for want of prosecution (see paragraph [49]);

(d) Father's domestic violence proceedings of March 2015 and April 2015 were struck out for want of prosecution on (see paragraph [49]);

(e) Father's application for third party discovery against [name of school 1 deleted] was struck out (see paragraph [51]) and that against [name of school 2 deleted] was discontinued by him;

(f) For complete clarity, Father's application pursuant to s 46R of 3 July 2015 to determine June's schooling in 2016 was resolved by consent. Mother did not consider there to have been any dispute at all, Mother always readily agreeing to the school. Father's application to have June attend counselling of 28 March 2014 was discontinued by him.

Analysis

Issue 1: Should costs be awarded?

Object of Legislation

[53] The object of the Care of Children Act 2004 is straightforward and well understood. In the context of this dispute it was to promote the welfare of June in the widest view and to determine all of her interests and to facilitate her development by ensuring the appropriate arrangements are in place for her guardianship and care and potential travel overseas. That involved the need to protect her from all forms of violence.

[54] The object of the Domestic Violence legislation is set out in s 5 of the Domestic Violence Act and it is to reduce and prevent violence in domestic relationships by recognising that domestic violence in all its forms is unacceptable and ensure where it occurs there is effective legal protection for victims. Ensuring effective legal protection for victims of domestic violence is fundamental to the Act, its sections and application. The converse is also true. Persons who are not victims of domestic violence should not be afforded costly opportunities to use the Act to other's detriment.

Questions in Dispute

[55] In my view the questions in dispute were not particularly complex but the way they were argued, the number of applications often filed on a without notice and the content of those pleadings made matters significantly complex. Distilled down for June's part, in terms of the COCA applications, the questions were: should the order preventing her removal to have a holiday with her father be removed; should there be a variation to the parenting order; should there be any ancillary discovery orders; should there be enforcement orders?

[56] In the domestic violence proceedings, the legal questions were relatively simple. The singular questions were whether there was domestic violence by Mother

and her husband to Father and/or June and if so, would it be necessary to make an order?

Outcome

[57] I consider that Mother was completely successful in all her applications and the intent and spirit of her applications. In particular:

(a) Father's application for the order preventing removal failed by virtue largely because of his inability to provide in a timely way the specifics of his intended trip to the United States and thereafter the concerns raised regarding the veracity of the intent of that trip by virtue of the matters that became apparent in his collateral proceedings and the way in which he was conducting the litigation. That application was eventually dismissed for want of prosecution. I have remarked that given Father has now appeared to have abandoned June and the best evidence of Mother is that he has likely left the country, possibly to the United States, I have considered the caution and reticence of Ms Gibson about "flight risk" that she raised to possibly be prophetic. While one cannot know, but given what has transpired, Mother was correct to seek as much detail and definition of Father's proposed trip overseas and the Court was right in my view to be cautious about lifting that OPR given the nature of Father's proceedings and his eventual possible leaving of the country but certainly abandonment of June in an unusual way;

(b) Mother's application for variation was successful. While originally it was very simple i.e. to ensure June came into her care when Father was working away as opposed to June staying with others, eventually Mother had to obtain full day to day care without contact to Father given Father's abandonment of June in unexplained circumstances;

(c) Father's applications for discovery against third parties were discontinued ([name of school 2 deleted]) and struck out ([name of school 1 deleted]);

(d) Father's applications for a protection order against Mother and her husband were struck out for want of prosecution but again only after Mother had had to go to the extent of prior applying for an order under r 194 which Father defended, although did not proceed given his non prosecution in due course;

(e) Father's application for guardianship determination that June go to a counsellor was discontinued – Judge Murfitt also noted likely because June was not prepared to do so;

(f) The determination as to schooling for 2016 was resolved by consent, Mother saying that there was never a dispute anyway and that an application was never required.

[58] While in my view Mother has been completely successful in almost all matters it has not been without literally a huge litigation effort by her and her counsel with respect to each and every matter and step (see also my comments at paragraph [70] hereof).

Merit

[59] Given the outcome it is clear that none of the proceedings for which Mother seeks costs against Father were meritorious applications by him.

[60] It is always appropriate for the Court to remind itself that it is a critical tenet of family law that the Court does to a degree have an inquisitorial jurisdiction and that it is charged with ensuring that all orders are made to protect victims of violence and optimise a child's welfare, development and safety. Therefore genuine and reasonable litigants ought not to fear an award of costs as it is important that all relevant arguments are heard. Conversely, of course, it is also important that those

who are subject to litigation that is not genuine or palpably lacks merit do not have the burden, financially or emotionally, inflicted on them of litigation that is not genuine or palpably lacks merit.

[61] There has traditionally been an approach in family law cases that as a general rule of thumb in the absence of behaviour which has led to protracted litigation, a reasonable stance or general obdurateness, finely balanced cases do not normally attract costs (see *PRH v CTB* (CIV-2001-419-1739, Hamilton Registry, Priestley J).

[62] This is not a finely balanced case. I have not detected given the outcome that the litigation had hallmarks of a genuine type that the Court should take into account so as not to order costs. The converse is the case.

Conduct of Proceedings

[63] This is really an analysis of the parties' conduct in their procedural approach to the proceedings and whether or not it elongated them or increased the costs for the other party unnecessarily or inappropriately.

[64] I have not detected any material defalcation in Mother's conduct in her procedural approach to the proceedings. By and large she conducted them without elongating costs. Her pleadings in my view were relevant, her evidence admissible.

[65] For Father's part, I have ultimately concluded there are palpable aspects of his conduct of the proceedings that did increase Mother's costs unnecessarily. While to some extent the issue can overlap the outcome of the proceedings and the merits of the parties' respective arguments, in my view some of Father's proceedings were often peppered with unmeritorious allegations, especially the domestic violence proceedings. The pleadings themselves are at times difficult to follow, clearly contain inadmissible material, lengthy to the point of at times oppressive in terms of ready ability to read and respond. Such approach to proceedings does increase the other party's costs and the need to sift through what needs to be replied to and what not. I appreciate that for the latter proceedings Father was self-represented but that

of itself cannot be advanced as an excuse when costs have increased for the other party because of conduct that is less than reasonable.

[66] There have been some particular incidences throughout the proceedings that have likely increased Mother's costs due to inappropriate litigation conduct. In particular, the filing of without notice applications, often as a first resort by Father where there being no grounds to do so. This litigation approach is particularly wrongful. His opposition to the s 133 report elongated that aspect of the proceedings and he was roundly wrong to do so, which required a chambers decision for approval of the brief. His failure to take part in the s 133 report in a meaningful way similarly compromised the conduct of the litigation. Failure to serve counsel with his submissions and affidavit defence to the application to strike out of 14 August 2015 necessitated yet a further adjournment of that matter and appearance. The third party discovery applications were unnecessary and in fact were not pursued by him. There is in fact an intensity in Father's pleadings and some affidavits are mixed in terms of submission and evidence which again adds to the difficulty in disseminating what needs to be replied to by affidavit and what by submission.

[67] Ultimately Father's conduct in simply abandoning June's care (for whatever reason) and to be fair we do not know exactly why, resulted in many multiple attendances for Mother and her counsel thereafter. If Father did not wish to pursue his applications he was at liberty to discontinue them in a helpful and reasonable fashion. The Court itself has gone to some length, having to serve Father at multiple addresses as his exact address for service was never quite clear and it is important the Court take all reasonable steps to ensure he is aware of notices, outcomes, and decisions in the service of proceedings. Father is a gentleman who from time to time has required exactitude and would take significant exception to not receiving notices, documents or pleadings and care in that regard had to be taken by the Court and parties.

[68] Father's modus has almost become to file multiple proceedings, often firstly without notice, plead them intensely, then not turn up to hearings and often fail to discontinue them in a timely way if not pursued by him.

[69] Of course, not all of Father's pleadings, approach or conduct had these characteristics but sufficient inappropriate litigation approach and conduct by him has, in my view, clearly increased the costs for Mother unnecessarily.

[70] I always retain a concern for June and I have expressed this many times during the proceedings that she should not have been the subject of so many applications and Court proceedings in the way that she was. I worry even this decision may result in even more litigation. I truly hope for the parties and June's sake it does not. It is appropriate in the circumstances that irrespective of these being family law Act matters, that an award of costs be made as it cannot be right for Mother to have weathered such costs in these combined circumstances. They are financially draining but also emotionally. They have to some extent worn Mother down. There have been multiple appearances by Mother in front of me where she is visibly upset and distraught by the intensity, nature and extent of the proceedings and the allegations made. Mother always respectfully attends court, is measured and moderate in her response to the applications and the Court generally but has at times become quite visibly shaken and upset yet she tries to restrain those obvious physical responses but on occasions is unable to do so such is her distress.

Actual Costs

[71] I accept that it has been impossible for Mother to itemise her legal costs individually for each individual application, that could not be done given they had become so intertwined. For all of the matters for which she seeks costs, her actual costs bill to Legal Services which she says she is required to repay is $6,081.92. Counsel advocates that her costs would be extensively more than this on a private basis and even on a legal aid basis counsel may not have been able to claim costs for which work has been done given the plethora, intensity, nature and frequency of the proceedings. I do not consider these costs unreasonable given the nature and extent of the proceedings.

[72] Father's actual legal costs are unknown. It appears in general terms, although this could be wrong to some extent, largely on those proceedings for which Mother

seeks costs Father was likely unrepresented or if he was represented he has not advocated his actual legal costs.

Means of the Parties

[73] Mother is in receipt of legal aid. The only time she was not was in respect to her application to travel to the United States. Mother and her husband live on a very limited income. Mother does not work and her husband is said to have modest employment with [employment details deleted]. That said, Mother has not provided a declaration of assets, liabilities, income or expenditure.

[74] Given Father has not filed submissions, his means are unknown. If he has travelled overseas Mother advocates he must have some degree of income. Prior to Father's disappearance, Mother's advocacy was that he had employment as [employment details deleted] but little else is known.

Decision

[75] This is not a finely balanced matter. I am of the firm view when I balance all of the matters considered above, that this is a matter where there ought to be a costs award in favour of Mother against Father, given the combination of Mother's means, the outcome of the proceedings, Father's conduct and the lack of merit of Father's proceedings. I do not consider an award of costs would negatively affect June's welfare at all.

Issue 2 – What ought to be the quantum?

[76] Mother has sought to recover all of her legal costs of $6,081.92. To achieve that, that would be an indemnity claim.

[77] Counsel for Mother has not sought to advocate that costs ought to be paid pursuant to the scale in the District Court and for example if the matters were categorised on a 2B basis I do not know what the costs would have been.

[78] Indemnity or increased costs are available and are specifically, in fact, available under the District Courts Rules if circumstances warrant the same. Rule 14.6 of the District Courts Rules 2014 provides:

> **14.6 Increased costs and indemnity costs**
>
> (1) Despite rules 14.2 to 14.5, the court may make an order—
>
> > (a) increasing costs otherwise payable under those rules (increased costs); or
> >
> > (b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (indemnity costs).
>
> (2) The court may make the order at any stage of a proceeding in relation to any step in the proceeding.
>
> (3) The court may order a party to pay increased costs if—
>
> > (a) the nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
> >
> > (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—
> >
> > > (i) failing to comply with these rules or a direction of the court; or
> > >
> > > (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
> > >
> > > (iii) failing, without reasonable justification, to admit facts, evidence, or documents or accept a legal argument; or
> > >
> > > (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or any other similar requirement under these rules; or
> > >
> > > (v) failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or
> >
> > (c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring the proceeding or participate in the proceeding in the interests of those affected; or
> >
> > (d) some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

(4) The court may order a party to pay indemnity costs if—

> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
>
> (b) the party has ignored or disobeyed an order or a direction of the court or breached an undertaking given to the court or another party to the proceeding; or
>
> (c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or
>
> (d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to the proceeding; or
>
> (e) the party claiming costs is entitled to indemnity costs under a contract or deed; or
>
> (f) some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[79] When I look at r 14.6(4) robustly, and the general discretion in COCA to award costs at a level deemed fit, this is a matter where in general terms there has been identifiable occasions when Father has failed to comply with reasonable directions, he has pursued unnecessary steps ranging from instituting the proceedings at all (often without notice), through to the requests for discovery and his attitude to the s 133 report and then abandoning proceedings without reasonably discontinuing them. Multiple court appearances that were unnecessary flowed from some of those actions.

[80] Similarly, again this is not a finely balanced matter, although indemnity costs are not regularly granted, this is a matter where I am entirely satisfied it is appropriate to provide an indemnity costs award. Mother's actual costs of $6,081.92 are reasonable given the breadth, extent and level of work required by counsel.

Order

[81] Accordingly, there shall an order for interparty costs in favour of the respondent Mother against the applicant Father in the sum of **$6,081.92**. Registry to provide sealed order.

E Smith
Family Court Judge

Signed at Christchurch on 2016 at am/pm